information and privacy commission
new south wales

Q&A prepared for panel discussion at the IPC seminar "the overlap between information access & privacy rights"

15 December 2011

Contents

Questions submitted for the seminar:

The overlap between information access and privacy rights

Section 54 of GIPA – clarify 'reasonably'

1. **Can you clarify the word 'reasonably' in the phrase 'reasonably be expected to have concerns'? It seems quite open to subjective interpretation. (Section 54(b) GIPA)**

Note: if this question is about unreasonable diversion of resources, see page 25.

External reviews and enquiries made to the OIC have shown that the interpretation of Section 54 can vary markedly between agencies. In response, the OIC has prepared Guideline 5 on the topic of consultation on public interest considerations under Section 54. This guideline states my view on the interpretation of this section.

We hope the guideline will promote greater consistency in practice among agencies and also resolve confusion about how, when and with whom to consult under Section 54. This guideline can now be found on the OIC's website under Tools and Resources for agencies.

We are to be guided by case law on the interpretation of the term "reasonably':

- A-G Dept –v– Cockcroft (1986) 10 FCR 180 at 190 per Bowen & Beaumont JJ tells us that the words "reasonably expected to have the effect" have their ordinary meaning. That is "whether it is reasonable, as opposed to irrational, absurd or ridiculous to expect ".
- According to the ADT in *Leech –v- Sydney Water Corporation* [2010] NSWADT 298 at [25], "The test to be applied is an objective one, approached from the point of view of the reasonable decision maker".

PPIP Act internal review application – personal and health information

2. Can you advise the best way to proceed when an application for internal review is received under the PPIP Act and deals with information which contains a mix of both personal and health information?

JD v NSW Medical Board [2008] NSWADT 67 gives us some guidance about considering whether information falls within the *Privacy and Personal Information Act 1988* (PPIP Act), the *Health Records and Information Privacy Act 2002* (HRIP Act) or both (see in particular at paragraph [24]). Relevant considerations from this case are as follows:

- Don't take an overly technical approach to working out whether or not something is personal or health information.

- Consider the information in its proper context. It's not necessary to dissect the information in great detail or word for word. For example, it's not necessary to describe one document as containing partly personal information and partly health information. It's better to make a call on whether it is one or the other.

Look at the definitions of personal information in Section 4 of the PPIP Act and health information in Section 6 of the HRIP Act as you go through the information to determine which one is more appropriate for each piece of information.

If you're having a difficult time working out whether something is personal information or health information then it's probably appropriate to class the information in question as personal information rather than health information. This is because personal information is more generic and broad in scope whereas health information is more specific and limited in scope.

Note that the definition of health information includes:

- Information about a health service provided or to be provided to an individual (s6(a)(iii) of the HRIP Act). For example, this could include information that an individual attended a psychologist for treatment on X date.

- Other personal information collected to provide, or in providing, a health service (s6(b) of the HRIP Act). For example, a hospital admission form may fall within this category.

Once you have worked out whether the information is personal information or health information, then consider the relevant provisions of the PPIP Act or HRIP Act as appropriate.

In some cases, the information in question may genuinely contain a mixture of personal and health information. If so, you need to consider both PPIP and HRIP as appropriate when carrying out the internal review.

Always bear in mind that the privacy legislation is beneficial legislation so, if in doubt, consider an interpretation that is beneficial to the applicant rather than the agency.

The process for carrying out the internal review will be the same whether the PPIP Act, HRIP Act or both Acts apply. Refer to Part 5 of the PPIP Act for the internal review process.

Remember that the Privacy Commissioner is given an opportunity to make submissions on the internal review findings. Generally, if this office has a strong view that you have applied the incorrect definition to the information in question, we will make submissions to you on this issue.

Public interest factors in favour of disclosure – personal information, GIPA and IPPs

3. Can you give guidance on public interest factors in favour of disclosure when a GIPA access application is for personal information the disclosure of which would breach an information protection principle (IPP)?

The considerations in favour would depend on the context and circumstances of the application. Here's why:

Firstly, in considering an application under the GIPA Act, you start with the general presumption in favour of disclosure (Section 5 GIPA Act).

As part of this presumption, you can consider any amount of public interest considerations in favour of disclosure.

Next, consider the specific considerations in favour of disclosure of this particular application. Each case will be different. The process requires that you are thorough in identifying and considering each factor. Remember there is no limit on the number of considerations in favour of disclosure.

The examples in Section 12 of the Act may help. For example, release of an executive's performance agreement and bonus pay could reasonably be expected to ensure effective oversight of the expenditure of public funds, and contribute to the informed debate on the issue of senior public servants' pay and performance (an issue of public importance).

It's important to remember that identifying the considerations in favour of disclosure is the first step in the public interest test steps. Therefore, you must consider the full ambit of considerations in favour of disclosure.

Identifying whether any considerations against disclosure in Section 14 of the GIPA Act applies is a later step.

Therefore, the considerations in favour of disclosure are not affected by or do not change because a breach of the IPP under clause 3(b) is later concluded.

It simply means that agencies weigh the consideration against disclosure (in this case breach of an IPP) against the full ambit of public interest disclosure in favour and assess if the breach of the IPP outweighs the significance of the public interest considerations in favour.

Some additional considerations:

- A breach of the IPP would only apply where the personal information requested concerns those of a third party. This is because the PPIP Act and the IPPs provide individuals a right to access their own information. In relation to requests for personal information, it would generally only be a breach of the IPP if someone was asking for the information of a third party under the GIPA Act.

- In terms of what this means in determining the application, if the application concerns a third party's personal information, agencies also need to remember that a breach of the IPP does not immediately give the agency sufficient cause to refuse access. The consequence of breaching the IPP must be so significant a consideration that it outweighs the public interest considerations in favour of disclosure.

- If so, agencies are then obliged to consider measures to mitigate the weight of the consideration against disclosure, e.g. by redacting the personal information of the third party so that there is no longer a breach of the IPP.

Access to personal information clause under PPIP – how it relates to GIPA

4. How is the access to personal information clause in Section 14 of the PIPP Act intended to relate to the GIPA Act (notwithstanding Section 5)? Can an agency still require a GIPA application or is there an obligation to release information without a GIPA application?

An applicant, or an authorised representative on behalf of the person, has a right to request access to their own personal information under PPIP. An agency can't require someone in this situation to formally apply for access to the information under GIPA. However, the agency should advise the applicant that if they agree to their personal information being released informally to them, they do not have any right to seek a review against the agency's decision (for example, if they are not happy with the form in which the agency decides to release the information).

Section 14 of the PPIP Act does not have direct relevance to the GIPA Act.

It is worth noting Section 10 of the GIPA Act:

> Disclosure and access under other laws
>
> (1) This Act is not intended to prevent or discourage the publication or giving of access to government information as permitted or required by or under any other Act or law that enables a member of the public to obtain access to government information.
>
> (2) This Act does not affect the operation of any other Act or law that requires government information to be made available to the public or that enables a member of the public to obtain access to government information.

In other words, agencies cannot use the GIPA Act as a "shield" against access permitted under other legislation like the PPIP Act.

The agency should advise the applicant of the various options and likely outcomes under the PPIP Act and GIPA Act, outlining the key advantages and limitations of each. The IPC has published a fact sheet on how to access personal information on its website which summarises an applicant's rights under both pieces of legislations. Agencies might like to refer applicants to this fact sheet or provide a copy of it to applicants to help explain the key differences between the PPIP Act and GIPA Act.

The IPC has released a knowledge update on processing requests for personal information which provides more comparisons and guidance for agencies.

Balancing Section 14 of GIPA with Section 5 of PPIP

5. How do you balance the provisions of 3 (a) and (b) of the Table in Section 14 of the GIPA Act with Section 5 of the PPIP Act?

This issue is addressed in the Information Commissioner's Guideline 4 on *Personal information as a public interest consideration under the GIPA Act*, which we hope you find a practical resource when dealing with requests for personal information under the GIPA Act. For example it provides questions agencies can consider to help determine if disclosure of personal information would reasonably be expected to contravene an information protection principle (IPP) in the PPIP Act.

Section 5 of the PPIP Act provides that nothing in that Act serves to lessen the obligations agencies must exercise under the GIPA Act.

One of the obligations agencies must exercise under GIPA is to carry out the public interest test, to determine whether or not to release information sought.

In carrying out the public interest test, two of the possible relevant considerations against release are found at 3(a) and 3(b) of the table to Section 14 of GIPA. That is, release would reveal an individual's personal information or contravene an information protection principle (IPP) or an health privacy principle (HPP).

If an agency finds that either 3(a) or both 3(a) and 3(b) are relevant, the agency may still release the information after applying the public interest test under the GIPA Act.

The obligation on the agency is to apply the public interest test and weigh the considerations both for and against disclosure. If the public interest considerations in favour of disclosure outweigh those against, then under a GIPA application, the personal information can be released to the applicant. The weight given will depend on issues such as the type of personal information being requested, the context of the request, and the extent of the breach.

In other words, the inclusion of 3(a) and 3(b) in the table at Section 14 allow privacy considerations to be properly taken into account, while meeting the objectives for openness, access and transparency within the GIPA Act.

Note also that section 15(a) of the GIPA Act requires that in determining whether an overriding public interest against disclosure of government information exists, agencies must exercise their functions so as to promote the object of the GIPA Act. Accordingly, agencies have an obligation to mitigate the strength of any public interest consideration against disclosure where possible so as to facilitate access. Accordingly, the agency might consider redacting the personal information so release would not lead to a breach of privacy or reveal an individual's personal information. Alternatively, an agency might consider providing view only access if the potential use of the information disclosed is the reason why disclosure would be withheld.

Additional questions and responses:

Determining when each Act applies

- **How do you know or determine which Act applies when, why and how?**

The IPC has published a knowledge update on processing requests for personal information to assist agencies in processing requests for personal information and a knowledge update on processing requests for health information to assist agencies with processing health information applications.

Which Act applies depends on who is seeking the information and whether it is personal information, health information or a mixture of types of information.

If a third party is seeking access to personal information that is not about them, they should apply under GIPA (unless they are an authorised representative of the person or it fits under specific situations in Section 18 of the PPIP Act e.g. necessary to prevent or lessen imminent threat to life)

For an individual seeking access to their own information, this can be dealt with under either the PPIP Act or GIPA Act if personal information and HRIP Act or GIPA Act if health information. The definition of health information may extend to include other personal information.

If the Act is not specified, an agency should process according to legislation which will be most cost-effective, efficient and beneficial to the applicant.

For personal information, this means PPIP should be the first option because it's free of charge, unless the applicant requests it be processed under GIPA or it's a third party seeking the information who is not the individual's authorised representative. (Although GIPA imposes stricter time limits, and provides different review rights – so agencies should be able to discuss what the difference might mean for the applicant, in order to assist the applicant chose the mechanism that suits them best.)

For health information, this means HRIP should be the first option unless the cost or processing time is likely to be more than under GIPA or it's a third party seeking the information who is not the individual's authorised representative.

If the request is for a mixture of personal information and access to other types of government information, the request may be best handled under GIPA. It is good practice to talk to your applicant and discuss the various approaches to determine how best to proceed.

Differences in personal information under PPIP, HRIP and GIPA

- **Can you explain any differences in the definitions of the term personal information in the Privacy legislation and the GIPA Act?**

Essentially the actual definition of "personal information" under the PPIP Act and GIPA is the same:

> "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."

Where the differences lie is that more exclusions apply to the definition of personal information under the PPIP Act than the GIPA Act. For example, health information is excluded from the definition of personal information under the PPIP Act, but the GIPA Act covers health information.

The PPIP Act also contains more exceptions in the definition of personal information than the GIPA Act (PPIP lists 12, GIPA only three).

For more information on this issue, please refer to our knowledge update on processing requests for personal information.

Consulting with third parties about release of personal information

- **When do you need to consult with third parties about the release of their personal information?**

The Information Commissioner's Guideline 5 on "Consultation on public interest considerations under Section 54 of GIPA" explores this question in detail. We hope it will be a practical resource for agencies, access applicants and third parties. It looks at issues such as the types of information that may trigger the requirement to consult and the purpose of the consultation requirement in Section 54 of the Act.

Opinion as personal information

- **Is an opinion considered the personal information of the giver of the opinion or the subject of the information (or both)?**

The definition of personal information refers to opinions being “about” individuals.

This suggests that the personal information conveyed by the opinion is that of the subject rather than the person who gives the opinion. So in the case of a work reference, the personal information would be of the person the reference is about, not the referee who gave the reference.

But when we offer an opinion about someone else, we may also reveal personal information about ourselves.

Using the same example, personal information about the referee that could be revealed could include their name, address, and contact details, plus their employment information (where they work, for how long, with what qualifications etc) as well as information about the relationship between the referee and the person they are giving a reference for.

For more information, please refer to Guideline 4 ‘Personal information as a public interest consideration under the GIPA Act’ which discusses the provisions relating to personal information under the GIPA Act in detail.

Section 20 (5) of PPIP Act

- **How does Section 20 (5) of PPIP Act work?**

Section 20 of the PPIP Act applies to the general application of information protection principles to public sector agencies. Section 20 (5) provides that any conditions or limitations on identifying, accessing or amending your own personal information imposed by the GIPA Act are not affected by the PPIP Act.

In practical terms, Section 20 (5) of the PPIP Act does not have any current application to the information protection principles. This is because at present, the GIPA Act does not contain any specific limitations or conditions in respect of an individual identifying, accessing and amending their own personal information outside of those which are already covered under the PPIP Act.

The provisions of section 5 of the PPIP Act continue to apply. For example, if an agency finds that either (or both) clause 3 (a) or 3 (b) to the Table to Section 14 of the GIPA Act are public interest considerations against disclosure and that releasing the information would contravene the PPIP Act, it may still release the information after applying the public interest test under the GIPA Act. This is made clear by Section 5 of the PPIP Act, which provides that nothing in that Act serves to lessen the obligations agencies must exercise under the GIPA Act. Therefore when applying the public interest test, if the public interest considerations in favour of disclosure outweigh those against disclosure, then the personal information can be released to the applicant.

Informal and formal release of personal information

- **How do I know when to give out personal information informally and when to require formal application?**

Both the PPIP Act and HRIP Act require access to be given to personal or health information at the request of the person without excessive delay or expense.

Under GIPA the fact that the information is the personal information of the person to whom it is to be disclosed is an example of a public interest consideration in favour of disclosure. You can give out personal information informally unless there is an overriding public interest against disclosure.

If the information contains personal information of another party as well, this may be an occasion where a formal application is required so that the third party can be consulted. This will ensure they have review rights if the agency, after considering their views and weighing up the public considerations for and against disclosure, decides to release their information.

Personal information of a third party does not provide the agency with an automatic or absolute right to deny access. The agency still needs to weigh the public interest considerations against disclosure against the strong presumption of a public interest disclosure in favour of disclosure. The agency can also consider redacting the personal information of the third party, where appropriate, to mitigate the strength of public interest considerations against disclosure.

Confidentiality in investigations – privacy and public interest considerations

- **In the context of investigations, 'confidentiality' of information is often quoted. Whose 'privacy' applies? Where does the public interest lie?**

There are some investigative functions of specific agencies where the information is considered excluded information with a conclusive presumption of an overriding public interest consideration against disclosure.

In these situations an agency may choose to subsequently consent to the release of some information if it is an important and relevant finding in the public interest, but they cannot be required to do so.

For investigations that are not covered by Schedule 2 of the GIPA Act, the public interest would need to be applied with all the relevant considerations for and against disclosure and determining where the balance lies.

Any considerations against disclosure would be restricted to those set out in the table to Section 14 and the relevance determined. For example if disclosure could prejudice the supply to an agency of confidential information, the agency would need to provide evidence the information was provided on a confidential basis and why its disclosure could impact on the agency's ability to function effectively.

Details of third parties already known

- **If a person already knows details of the third parties whose personal information is contained in the information they are requesting access to, what are the options? (eg. informal release with conditions)**

It is still appropriate to consult the third party and give them an opportunity to consider the request and confirm their view. But in assessing where the greater public interest lies, the fact that the applicant already knows the personal information of the individual contained is a relevant consideration to favour disclosure.

Placing a condition is an option under Section 73 of GIPA, but in this type of situation it is only relevant to avoid there being an overriding public interest consideration against disclosure.

Alternatively, if the personal information is not pertinent to the purpose of the request and intention of use (eg. if someone wanted to know the nature of allegations against them and the personal information of the complainant is not pertinent) then the agency could redact the personal information. This provides a stronger guarantee against the personal information being used inappropriately once it is released.

An Administrative Decisions Tribunal (ADT) decision, 'Flack v Commissioner of Police', provides some useful discussion on where some information has already been publicly disclosed.

The Administrative Decisions Tribunal (ADT) decision in Richards v. Commissioner, Department of Corrective Services [2011] NSWADT 98 has led to the Information Commissioner recommending that some of the public interest considerations against disclosure in the table to section 14 of the GIPA Act do not apply to information that has already been "revealed". In particular:

- clause 1(d) did not apply to information that had been publicly disclosed in court proceedings, and
- clause 1(e) did not apply to information that was an opinion about the applicant that had already been revealed to him in the course of a concluded deliberative process.

Information should be disclosed to an applicant if:

- the information is a fact already known to the person applying for the information

- the information has been publicly revealed, and it is difficult to establish that an agency will be prejudiced by disclosing that information under the GIPA Act.

Alternatives to disclosing personal information – redaction, consultation

- **What are the alternatives to disclosing personal information (eg. redaction, view only, consult)? When do I need to consult?**

The purpose of consultation is to know if a third party objects to the release of their personal information and if so why.

The Information Commissioner's Guideline 5 on consultation on public interest considerations under Section 54 of GIPA looks at the question of whether consultation is mandatory under Section 54. The guideline also details suggested approaches for the consultation process, as the GIPA Act is not prescriptive about how agencies should consult.

Following consultation, the agency must take into account the views of third parties in making its decision about whether there are any public interest considerations against disclosure of the information and whether that consideration carries sufficient weight to make it an overriding one.

The views of the third parties are an important contribution to the agency's decision but they do not in themselves determine the outcome of the public interest test.

Agencies are obliged to consider ways in which to mitigate the strength of public interest considerations against disclosure so as to facilitate access. Sections 73 to 75 of the GIPA Act detail alternatives to disclosing personal information to avoid an overriding public interest against disclosure.

Performance agreements and reviews as personal information

- **Are performance agreements, performance contracts, and performance reviews personal information that cannot be disclosed to third parties?**

That's an interesting question, for which there is not a definitive answer except there is no conclusive presumption against disclosure of this information under the GIPA Act. It is also not directly excluded from the definition of personal information under the PPIP Act.

If the information is a standard document such as a position description or generic performance agreement then it may be considered as information as part of the recruitment process and therefore not personal information.

If it is personalised following appointment, it may be considered personal information under both the PPIP and GIPA Acts and therefore the real question is addressing where the weight of the public interest lies.

For example with performance reviews, one could argue there is more personal information, including health information, that could be revealed and disclosure could possibly contravene an information protection principle. However, the public interest in access to the information may be greater if it relate to, for example, oversight of expenditure of public funds etc.

Special provisions for personal information from recruitment

- **Are there any special provisions for personal information from recruitment decisions/processes?**

Under the PPIP Act such information is not personal information, as Section 4(3) (j) says information or an opinion about an individual's suitability for employment is not included in the definition of personal information.

If the request for this information had been made under the PPIP Act, you could advise the person that the information, or some of the information, may be accessible under the GIPA Act; however, you should consult with the referees.

Unreasonable or substantial diversion of resources

- **If an individual makes numerous requests for personal information under the GIPA Act, is it reasonable for the agency to make a decision under s60(a) of the GIPA Act 'to refuse to deal with the application because it would require an unreasonable and substantial diversion of the agency's resources' even though it's their personal information?**

Section 60(a) of the GIPA Act says that a decision 'to refuse to deal with an application because it would require an unreasonable and substantial diversion of the agency's resources' is a decision an agency can make in any application so long as the elements are met.

Excessive and repeated requests for personal information under the GIPA Act is not an issue that has been brought to our attention. However, if an agency does experience this then Section 60(a) is a certainly a mechanism to deal with this.

However, agencies should be wary about using Section 60(a) to deny persons access to their personal information, especially if the request is legitimate.

Examples of scenarios where it would not be reasonable to use Section 60(a) in requests for personal information:

- It may be that an individual is making a separate request for each item of personal information the agency holds about them without realising they can include all information in a single request. In this case, the agency should talk to the applicant and explain that they will process their request in its entirety, rather than duplicating their decision on each physical application.

- It may be that the information sought is so large or vague that it requires extensive searches. This can be because the applicant doesn't know what information the agency holds that may be relevant to their purpose. In this case, the agency should talk to the applicant and explain that it would be in their interest to narrow their request and pinpoint the specific information they require in order to reduce time and costs. The agency may also explain what information they actually hold to assist the applicant to narrow their request.

Example where Section 60(a) would be appropriate:

- If a single applicant makes multiple requests over time for the same personal information described slightly differently each time which has already been provided to them in former requests or where the agency has advised they don't hold that information.

Detailing Clause 3(f) in your notice of decision without adding to the identified risk of harm

- **When an agency has determined personal information cannot be released because it may expose a person to a risk of harm or of serious harassment or serious intimidation (clause 3(f) in section 14 Table), how do you explain this in the notice of decision without adding to that risk?**

An agency must provide a notice of decision to refuse access in accordance with section 61 of the GIPA Act. The notice must state:

(a) the agency's reasons for its decision,

(b) 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,

(c) the general nature and the format of the records held by the agency that contain the information concerned.

If the agency determines that clause 3(f) in the Table to section 14 is one of the reasons influencing the agency's decision to refuse access, the agency should name clause 3(f) as a reason in its decision.

The level of detail provided in its reasons will depend on the circumstances of the case. The agency does not need to detail the nature of the risk, or identify the individual who may have raised a risk of harm. In some cases, it may be appropriate to state that a third party has raised a risk of harm without identifying the third party, and state that the agency has investigated the allegation and believes that it is credible. However, if outlining that a third party has raised a risk would put that person at risk then it would be appropriate to simply state that clause 3(f) was one of the reasons for the decisions without providing additional details. Similarly, the notice could state that the reason facts around section 61 have been withheld is to protect the individual, but can be made available to an appropriate review body – be it the person who conducts an internal review, or to the Information Commissioner or the ADT, on a confidential basis.

While there are circumstances to justify a notice of decision not providing detailed reasons, an agency must nevertheless keep clear (albeit confidential) contemporaneous records of its reasons for applying 3(f) and the weight attributed to it, and it must be able to provide the Information Commissioner or the ADT a copy of that record if the matter is reviewed. Clear and full records are particularly important where detailed reasons cannot be provided to the applicant, as it is pertinent to justify the agency's decision and reason for providing limited facts in the notice of decision.