information and privacy commission new south wales

SUBMISSION TO PROPOSED CHANGES TO QUEENSLAND'S INFORMATION PRIVACY AND RIGHT TO INFORMATION FRAMEWORK

Submission by the Information and Privacy Commission NSW

22 July 2022

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Commissioners' signatures have not been included in this submission to facilitate public access to the submission, manage security risks and promote availability in accordance with the *Redacting signatures on public facing documents Practice Guide* published on the IPC website.

The Information and Privacy Commission NSW (IPC) welcomes the opportunity to provide a submission to the Proposed Changes to Queensland's Information Privacy and Right to Information Framework.

About the IPC

The Information and Privacy Commission NSW (IPC) oversees the operation of privacy and information access laws in New South Wales.

The Privacy Commissioner has responsibility for overseeing and advising NSW public sector agencies on compliance with the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and the *Health Records and Information Privacy Act 2002* (HRIP Act).

The Information Commissioner has responsibility for overseeing the information access rights enshrined in the *Government Information (Public Access) Act 2009* (GIPA Act) and exercises functions under the *Government Information (Information Commissioner) Act 2009* (GIIC Act). The Information Commissioner also holds the role of NSW Open Data Advocate, in which capacity she provides advice across the NSW Government on nonpersonal data that should be released to the public.

The IPC is an integrity agency tasked with supporting Commissioners' functions that are fundamental to the preservation and advancement of representative democratic Government.

Information access and privacy related reforms

A single right of access including personal information

The Consultation Paper recommends amending the *Right to Information Act* 2009 (Qld) (RTI Act) and the *Information Privacy Act 2009* (Qld) (IP Act) to provide a single right of access to information, including for an individual's personal information. The single pathway for accessing personal information would be contained in the RTI Act and would include provisions for amending personal information.

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Both the NSW Information Commissioner and NSW Privacy Commissioner consider that it is fundamental that citizens have clarity and understanding of how to access their personal information. When consolidating a pathway for access to personal information, consideration should be given to the distinct purposes and procedural differences of the existing privacy and information access regimes. In this regard, the objective of information access laws is to promote open government, in relation to the handling of personal and non-personal information, and the objective of privacy laws is to protect and promote the fair handling of personal and health information.

Under the NSW privacy laws, a public sector agency that holds either personal information or health information is required without excessive delay or expense, to provide the individual with access to the information free of charge (s 14 of PPIP Act; s 33, cl 7 of Sch 1 to HRIP Act). Individuals can request appropriate amendments (whether by way of corrections, deletions or additions) to their personal information, and agencies have specific obligations when handling such a request. These obligations include ensuring that the personal and health information is accurate, relevant, up to date, complete and not misleading (when considering the purpose for which the information was collected (or is to be used) and any purpose that is directly related to that purpose) (s 15 of PPIP Act; cl 8 of Sch 1 to HRIP Act).

An individual can also apply for their personal information via information access laws in NSW. Under the GIPA Act there is a general presumption in favour of disclosure of government information, which includes personal information held by an agency. In assessing whether to provide access to personal information, an agency must weigh up whether there are any considerations against disclosure, noting that personal information held by agencies will often be a mix of both personal and non-personal information (s 14 of GIPA Act).[1] An agency must determine an application within specific timeframes, generally being 20 working days, unless certain conditions apply (s 57 of GIPA Act), with the first 20 hours to process an application for personal information being free of charge (s 67 of the GIPA Act).

Information access reforms

Access applications and amendment applications

The NSW Information Commissioner supports the proposal to remove the requirement for access applications to be made in an approved form, while still requiring a written application, noting that this will simplify the process and increase accessibility of making an access application.

The NSW Information Commissioner notes in particular the requirement for access applications to be made in written form. In this regard, the circumstances of how an access application comes to be made in written form may need to be carefully considered given technological advances. This is raised in the context of NSW experience where an applicant that was seeking external review left a voicemail message after business hours on the last day that was within time to seek review. This raised issues about whether a valid access application could be made in this way, i.e. not in written form, however, noting that technology can automatically convert voice messages to text. Regardless of how an application must be made, caution should be applied to ensure that any access application includes sufficient detail as is reasonably necessary to enable an agency to identify the government information applied (s 41(1)(e) of the GIPA Act).

[1] See *Walton v Eurobodalla Shire Council* [2022] NSWCATAD 46 at [107]-[110].

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Evidence of identity

The Consultation Paper recommends removing the requirement in the RTI Act for agents to provide evidence of identity in all cases. The NSW Information Commissioner supports this proposal noting that agencies retain the power to request written proof of an authorisation. In addition, the NSW Information Commissioner notes that it may be more appropriate to rely on other laws that recognise situations that certain persons are able to act on behalf of another person, for example, a person acting under an enduring power of attorney, or a guardian.

Single period of time for processing applications

The NSW Information Commissioner is supportive of the proposed amendment to have a single period of time for processing applications which can be increased to include a further period in which the agency is entitled to continue working on the application. This is analogous to the situation in NSW where under the GIPA Act an agency must decide an access application and give the applicant notice of the agency's decision within 20 working days (the decision period) after the agency receives the application (s 57(1)). In NSW the decision period, similar to the proposed amendment in relation to the processing period, can be extended by up to 10 working days, for a maximum extension of 15 working days for any particular access application, for the purpose of either consulting with another person as required under the GIPA Act (s 57(2)(a)) and/or retrieving records from a records archive (s 57(2)(b)).

Removal of mandatory requirement for a schedule of relevant documents

The Consultation Paper proposes to remove the mandatory requirement to provide applicants with a schedule of documents on the basis that agencies have reported that applicants rarely reduce the scope of their access application after sighting the schedule of relevant documents.

The NSW Information Commissioner notes the intended objective of the schedule appears to be to ensure that there is transparency about the government information available and thereby assist an applicant to make informed decisions about their access application. In removing the requirement to provide a schedule of relevant documents, consideration could be given to whether agencies should be positively obligated to provide reasonable advice and assistance when determining an access application.

For example, in NSW there are positive obligations on agencies when handling an information access application. This includes an obligation to provide advice and assistance to applicants, so far as it would be reasonable to expect the agency to do so, to assist an applicant to provide such information as may be necessary to enable the applicant to make a valid access application (s 52(3) of the GIPA Act). A similar positive obligation for agencies could be considered to provide reasonable advice and assistance that would support applicants to narrow the scope of the access request.

Amendment to the definition of processing period

The Consultation Paper proposes to amend the definition of processing period to ensure that the five business days it takes to post decision notices will not count towards the processing period. In this regard, the NSW Information Commissioner notes that agencies in NSW are required to provide notice within the decision period of 20 working days after the agency receives the application (s 57 of the GIPA Act). The GIPA Act provides that when that notice, or notification, is given by an agency to a person by post the matter concerned is considered to have been given to the person when it is posted by the agency (s 126(2) of the GIPA Act). This approach provides greater certainty for agency decision-making and compliance and removes the risk of a deemed refusal of an access application based on the time taken for a notice to be delivered by post.

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Clarify that other matters can be considered as part of the public interest balancing test

The Consultation Paper proposes to amend the RTI Act to include an express statement that factors, other than those listed in schedule 4, may be considered as part of the public interest balancing test. The NSW Information Commissioner supports the proposal and notes that the GIPA Act does not limit any other public interest considerations in favour of the disclosure of government information being contemplated when determining whether there is an overriding public interest against disclosure of government information (s 12(2) of the GIPA Act).

Consistently, when agencies are balancing public interest considerations against disclosure, they are limited to those explicitly listed in the GIPA Act (s 14(2) of the GIPA Act). This reflects good practice with respect to right to access and exceptions and refusals (see RTI indicators 2, 28 and 31[2]) where NSW has a legal framework that creates a specific presumption in favour of access to all information held by public authorities, subject only to limited exceptions.

Disclosure log requirements

Amendments to the RTI Act are proposed so that Departments and Ministers, like agencies, will have discretion about whether to include documents in a disclosure log. The proposal would, if documents are to be made available, only require agencies to include information identifying the relevant documents and information about how those documents could be accessed, rather than publishing the material in full.

The NSW Information Commissioner notes that a key objective of information access regimes, is to encourage a proactive public release of government information as this advances the goal of a democratic government that is open, accountable, fair and effective. Disclosure logs are an important element of any information access regime as a way of mandating the proactive release of information. The importance of disclosure logs is recognised as being part of best practice information regimes where public authorities are required to create and update lists or registers of the documents in their possession, and to make these public (RTI indicator 58).

In this regard, in NSW the GIPA Act requires agencies to record information about access applications if it may be of interest to other members of the public. The GIPA Act facilitates transparency and accessibility to government information by also requiring the following information be recorded in an agency's disclosure log: the date the application was decided; the description of information to which access was provided in response to the application; and, a statement as to whether any of the information is now available from the agency to other members of the public and (if it is) how it can be accessed (Part 3, Div 4 of the GIPA Act).

Publication scheme requirements

The NSW Information Commissioner is strongly supportive of the proposed amendment, noting that the publication scheme is consistent with the requirements in NSW with respect to an agency information guide (AIG). The Information Commissioner notes that in NSW agencies are required to review their AIG and adopt a new AIG at intervals of not more than 12 months (s 21 of the GIPA Act) and agencies must notify, and if requested to do so consult with, the Information Commissioner before adopting or amending an AIG.

[2] Global RTI Rating | Centre for Law and Democracy (law-democracy.org)

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The NSW Information Commissioner notes the proposal also extends to requiring agencies to publish information prescribed by regulation, to the extent that the information is held by the agency, and where that information is significant, appropriate and accurate. The NSW Information Commissioner is strongly supportive of the proposal noting it would strengthen the mandatory proactive release of government information.

Annual reporting requirements on the operation of the *Right to Information Act*

The NSW Information Commissioner strongly supports the proposal to amend the annual reporting requirements for the operation of the information access legislation from the Minister to the Information Commissioner, and requirements on agencies to provide the relevant information for the annual report to the Information Commissioner as soon as practicable after the end of a financial year. The proposal aligns to the global RTI indicators relating to public authorities being required to report annually on the actions they have taken to implement their disclosure obligations, including statistics on requests received and how they were dealt with (RTI indicator 60), and for a central body, such as an Information Commissioner, to present a consolidated report to the legislature on implementation of the law (RTI indicator 61).

The NSW Information Commissioner notes that the proposal is consistent with the situation in NSW, where agencies are required to report certain statistical information to the Information Commissioner required for the annual report (s 125 of the GIPA Act; Schedule 2 to the *Government Information (Public Access) Regulation 2018 (NSW)*). This includes statistical information about:

- applications by applicant type and outcome
- number of applications by type of application and outcome
- invalid applications
- how many times each conclusive presumption against disclosure was used,
- the occasions where an application was not successful because of other public interest considerations against disclosure
- timeliness of applications, and
- external reviews.

The information provided by agencies is used to inform the annual report on the operation of information access laws by the NSW Information Commissioner, which the Commissioner is legislatively required to prepare and publish report (s 37 of the GIIC Act). Importantly, the findings and intelligence from the report are used to inform the forward program of work of the IPC and engagement with agencies.

To support agencies in meeting their legislative requirements, the IPC has developed guidance, training and a custom-made application, the GIPA Tool, which is a free cloud based and fully supported internet-based application that enables agencies to report the required statistical information to the Information Commissioner.

The NSW Information Commissioner notes more broadly the benefits of reporting on the operation of information access regimes particularly in the context of a rapid growth in information access requests in NSW consistent with global trends. In this regard, the NSW IPC will be undertaking research that aims to contribute to information access practices by examining the existence and use of effective administrative and reporting schemes for the informal release pathway that promote and facilitate informal access and proactive release programs by NSW agencies and can enable ongoing measurement and analysis. This also supports, and is aligned, to good administrative decision-making and practice.[1]

[1] NSW Ombudsman https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0016/3634/Good-conduct-and-administrative-practice-guidelines-for-state-and-local-government.pdf

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Privacy reforms

Definition of personal information

The NSW Privacy Commissioner supports the proposed recommendation to amend the definition of personal information to be more flexible and technology neutral, including to make it clearer that personal information can, in addition to inferred information, include technical information. The proposed changes would bring Queensland into greater alignment with the Commonwealth definition and other jurisdictions, including the definition of personal data within the European Union's General Data Protection Regulation (GDPR). The NSW Privacy Commissioner considers it important to work towards harmonisation and consistency where appropriate, given the increasingly cross-jurisdictional nature of information flows and the need to improve clarity for both regulated entities and citizens.

In changing the definition of personal information and bringing Queensland in alignment with the Commonwealth, consideration should be given the recent proposals with respect to the definition of personal information within the Australian Attorney-General's Department Privacy Act 1988 Discussion Paper. The proposal included amending the definition of personal information to reference that an individual is 'reasonably identifiable' if they are capable of being identified, directly or indirectly.

The proposal also included a non-exhaustive list of the types of information capable of falling within the definition of personal information such as, but not limited to, location data, an online identifier or one or more identifiers specific to the physical, physiological, genetic, mental, behavioural (including predictions of behaviours or preferences), economic, cultural or social identity or characteristics of the person.

Adoption of one set of Privacy Principles

The Consultation Paper recommends adopting a single set of privacy principles for Queensland that would result in a uniform set of rules applying to all Queensland agencies and their contracted service providers.

The NSW Privacy Commissioner in principle agrees with the intent of the proposal to reduce 'red tape', where appropriate and possible, and compliance costs for regulated entities. In addition, the NSW Privacy Commissioner considers it fundamentally important that any person subject to Queensland privacy laws, including NSW citizens, have a greater understanding of their privacy rights and how their personal information will be regulated.

The NSW Privacy Commissioner notes that the Consultation Paper outlines the proposed Queensland Privacy Principles (QPPs) and if adopted, the specific wording would be subject to further consultation. In this regard, when considering whether to adopt a single set of privacy principles and/or in their design, there is a need to weigh any specific issues that arise with respect to one set of privacy principles for both personal information and health information.

For example, in the NSW context a specific regulatory regime to protect health information exists in the HRIP Act, and associated regulation, in recognition of the particular requirements of health authorities and healthcare providers in managing health records. In this regard, the HRIP Act contains specific provisions relating to aspects of health information, such as, those relating to the disclosure of healthcare identifiers (s 75A).

Enhanced powers and functions to respond to privacy breaches

The Consultation Paper recommends that the IP Act be amended to enhance the compliance and enforcement powers, and extend functions, of the Commissioner to better protect the privacy of individuals and be able to respond to privacy breaches.

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These enhancements would include an own motion power to investigate, on the Commissioner's own initiative, an act or practice of an agency which may be a breach of the privacy principles, and if there are grounds for a compliance notice to be issued. This would include the use of existing powers under the IP Act, and additionally allow a report to be made to the Speaker and the Parliamentary Committee on the outcome of the investigation as well as being tabled in Parliament. In addition, the Commissioner would have the power to intervene in tribunal or court proceedings involving the IP Act, with the leave of the court or tribunal and on terms or conditions provided by the court or tribunal.

The NSW Privacy Commissioner is supportive of the proposals to enhance the compliance and enforcement powers, and extend the functions, of the Commissioner. It is fundamentally important that a regulatory oversight body has commensurate powers and functions to be able to be effective in meeting its objectives and noting community expectations about the protection of privacy rights in an increasingly challenging digital age. It is essential that any enhanced responsibilities and functions for the Commissioner are resourced and funded appropriately, so that the Commissioner is able to effectively use any enhanced suite of regulatory and/or enforcement powers.

Adoption of a mandatory data breach notification scheme

The Consultation Paper outlines that the proposed scheme would include a threshold for eligible data breaches; assessments to be completed within days; notification processes to both the Queensland Office of the Information Commissioner and to affected individuals. The proposed scheme would have limited exceptions including where compliance would be inconsistent with secrecy provisions and where the Commissioner declares that notification is not required.

The NSW Privacy Commissioner supports the introduction of a mandatory data breach notification scheme and the commensurate powers for the Commissioner to monitor and oversight the proposed scheme. In NSW, a consultation Draft Bill has been prepared to establish a mandatory notification of data breach (MNDB) scheme in NSW and in designing a potential NSW scheme, the working group was informed by the Commonwealth's NDB scheme.

Additionally, noting that some NSW public sector agencies are currently captured by the Commonwealth scheme in part (e.g., if a breach involves tax file numbers), the NSW MNDB scheme was designed to be similar to the Commonwealth scheme. In adopting a harmonious approach, Queensland will make it easier for agencies to comply with both schemes and promote streamlined processes.

In designing the scheme, the NSW Privacy Commissioner notes that consideration should be given to also making it a requirement that an agency provide notice of the actions it will take or has planned to take to mitigate any harms arising. If passed by the Parliament, the scheme will require agencies to outline what actions have been taken or are planned to ensure that personal information is secure, or to control or mitigate the harm done to the individual (section 59N(g)).

The NSW Privacy Commissioner notes that consideration should be given to whether there should be any further exemptions under the proposed scheme. In this regard, the Draft Bill in NSW proposed that there be six exemptions where an agency is not required to notify an affected individual but is required to notify the Privacy Commissioner. These are:

- multiple agencies: if a breach affects multiple agencies, an agency is exempt from compliance if another agency provides the notifications required under the MNDB scheme

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- prejudice an investigation or proceedings: if notification would prejudice an investigation that could lead to prosecution of an offence, or prejudice court or tribunal proceedings
- mitigation of harm: if an agency has taken action to mitigate the harm done by the breach and as a result there is not likely to be a risk of serious harm to an individual
- secrecy provisions: if notification is inconsistent with a secrecy provision, an agency is not required to notify an affected
- health and safety: if notification would create a serious risk of harm to an individual's health or safety, and
- cybersecurity: if notification would worsen the agency's cybersecurity or lead to further data breaches.

Extend privacy obligations to subcontractors

The NSW Privacy Commissioner supports in principle the proposal to extend the privacy obligations in the IP Act to subcontractors by making contracted service providers responsible for taking reasonable steps to ensure a subcontracted service provider is contractually bound to comply with the privacy principles. Such a provision would align with the increasing use of contractors, and subcontractors across the public sector, for service delivery.

The Privacy Commissioner notes that extending privacy obligations in this way is likely to require careful consideration of how the state scheme interacts with the existing Commonwealth scheme, to ensure that any potential overlap between the schemes and the need for reporting under both schemes is minimised and that regulated entities understand their obligations and are able to comply effectively with the scheme.

Conclusion

We hope these comments are of assistance. The NSW IPC would be pleased to consult with the OIC Queensland as necessary as the review progresses.

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