

Commissioner's Overview

The role of Information Commissioner has enlightened me in many ways, none more so than the galvanisation of my commitment to: the principles underpinning a responsible, representative system of government¹ and, securing the public interest in accessing information.²

This, my last Report on the Operation of the *Government Information (Public Access) Act* (GIPA Act) in New South Wales (NSW), provides an opportunity to constructively reflect on:

- achievements in preserving and promoting the right to access information;
- contemporary challenges to the right to access information; and
- the way forward.

Preserving and promoting the right to access information – what has been achieved?

Accountability and transparency have been a hallmark of the Information and Privacy Commission (IPC) throughout my two, five-year terms. The regulatory reports we publish serve dual purposes. They reflect our findings and guidance to improve compliance and therefore, they also reflect our regulatory action and its effectiveness.

I commenced the publication of Reports on the Operation of the GIPA Act in my first year of appointment with both a combined three-year retrospective report (2010-2013) and the 2013/14 Report. Since then, we have tracked compliance annually with the operation of the formal access pathway under the GIPA Act³ and the publicly accessible GIPA dashboard that measures agency performance.⁴

The significant changes reported from 2013/14 to 2021/22 highlighted below, demonstrate sustained outcomes that reflect the:

1. extraordinary growth in applications from members of the public;
2. significant maturation of processes within agencies that support the right to access information in the face of an 84% increase in applications over 8 years; and
3. advanced regulatory effectiveness of the IPC.

From 2013/14 to 2021/22:

- applications received increased from 12,945 to 23,789 (84% increase)
- applications from members of the public increased from 48% to 83%
- applications from legally represented members of the public increased from 28% to 44%
- partly personal and partly other information applications increased from 6% to 19%
- decisions made within the statutory timeframe increased from 80% to 88%
- decisions refused in full decreased from 8% to 5%
- decisions in which access was granted in full and in part decreased from 74% to 70%
- review by the Information Commissioner increased from 15% to 40% of all reviews.

These results unequivocally demonstrate the increasing exercise of the right to access government held information and the demonstrable value placed on that right by citizens. Legal representation has increased and so too has the percentage of applications seeking partly personal and partly other information.

Notwithstanding that technology should be making access to information easier, these outcomes might reflect an increase in complexity in the way information is stored in a digital government environment.

¹ GIPA Act section 3

² GIPA Act section 12

³ GIPA Act section 9

⁴ <https://www.ipc.nsw.gov.au/information-access/agency-gipa-dashboard/gipa-dashboard>



To promote the right of access to information in this more intricate environment, new lines of authority are developing.⁵ For example, recognition that an agency cannot unilaterally extend time for decision-making where records are held in a digital archive that does not require extra effort to retrieve.

Despite an 84% increase in applications since 2013/14, timeliness of decision-making by agencies has increased. This demonstrates the maturation of the systems, processes and policies implemented by agencies to support their information application functions. NSW agencies are commended for this sustained improvement.

There are some variations in release rates. On one hand decisions to refuse in full have decreased but release rates have also decreased by a similar percentage.⁶

Fortunately, we have visibility over national trends through the national metrics initiated in my role as a member of Australia's Open Government Partnership.⁷ This work commenced in 2014/15 and over that period, the NSW refused in full rate decreased steadily from 14% to 6%. As a similar proactive release regime, Queensland refused in full rate decreased from 24% to a low of 16%; and the lowest refused in full rate has been consistently occupied by Victoria, between 2% and 4%.

Release rates are measured somewhat differently under the national metrics. Those measures see an increase in release rates from 86% to 94% in NSW. The leading jurisdictions in release rates are Victoria and Western Australia with release rates of between 94% and 98%.

Considered in this national context NSW agencies are performing well.

The IPC is also performing well, particularly given it is the only Australian jurisdiction operating under a timeframe for finalisation of reviews. Our timeliness is superior notwithstanding significant year-on-year increases in applications and new functions.⁸ The quality of, and trust in, our decisions is also evidenced by the growth in the percentage of reviews conducted by the IPC (providing one of two external review avenues) from 2.4% to 6% over the years 2014/15 to 2020/21.

External Review by the Information Commissioner has grown in recent years as the most utilised review avenue conducting 40% of all reviews including internal reviews.⁹

Further evidence of the value of the IPC is provided through independent brand awareness surveys and client feedback mechanisms.

Our 2022 IPC Brand Awareness Survey demonstrates significant improvements in the IPC's regulatory impact from the first survey in 2017. In 2022:

- 80% of respondents confirmed that they had heard of the IPC, an increase from 66%
- among those who had heard of the IPC, 39% were familiar with what we do, 10% higher than in 2017
- a significant growth in the application of IPC resources by users.

In 2022, the words that were most used to describe the IPC were 'trustworthy' (77%), 'independent' (76%) and 'respected' (74%).

In summary, the results across the past decade of reporting demonstrate that significant maturation and effective regulation has ensured that overall, the formal access pathway under the GIPA Act and Information Commissioner review functions are working effectively.

Additionally, significant changes must inform our way forward in modernising the GIPA Act, including:

- digital government and outsourced service provision;
- awareness of the need for government transparency and accountability;
- public interest factors in favour of disclosure including care and protection of the environment;
- the increased volume of applications;
- the increase in legal representation;
- the type of information sought; and
- the dominance of reviews by the Information Commissioner.

⁵ *Ireland v Central Coast Council* [2022] NSWCATAD 366; *Eric Anthony Foster v Department of Planning and Environment* [2022] NSWCATAD 235

⁶ National metrics dashboard https://www.ipc.nsw.gov.au/sites/default/files/2022-06/OGP_Metrics_all_jurisdictions_all_years_June_2022.pdf

⁷ https://www.ipc.nsw.gov.au/sites/default/files/2022-06/OGP_Metrics_all_jurisdictions_all_years_June_2022.pdf

⁸ *Digital Restart Fund Act 2013 section 10*

⁹ IC reviews represent 40% of all reviews, Report on the Operation of the GIPA Act 2021/22

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Key areas for reform include:

- improved reporting to better understand if the applications seeking personal information are seeking their own or another's personal information
- barriers to accessing information that might inspire the increase in legally represented applicants
- national developments that inform factors in favour of and against disclosure including care and protection of the environment as a factor in favour of disclosure¹⁰ and the operation of Cabinet in Confidence under the GIPA Act in circumstances where nationally and internationally this information is treated more transparently.¹¹

More work is required in relation to the other pathways under the GIPA Act¹² to ensure that the Act's vision for transformation from closed government information to open by default is achieved. This year, I commissioned independent research to inform our guidance to agencies in promoting the informal access pathway.¹³

Accountability and transparency in NSW – is the GIPA Act fit for purpose?

Effective governance has been frequently and imaginatively challenged in NSW. A progressive and robust framework of independent pro-integrity institutions is essential to prevent corruption. The GIPA Act and the role of the Information Commissioner combine to assure and promote the most effective treatment in combatting corruption - accountability and transparency.

All legislation requires regular examination against its objects and operation. New challenges to integrity have arisen during my terms in office as a feature of contemporary government. These challenges include the rapid transformation to digital government, the increasing prevalence of grants to citizens and other

entities, and contracts for the provision of traditional government services. It is from this perspective that I have engaged with Departments to modernise the GIPA Act and its complementary legislation, the *Government Information (Information Commissioner) Act 2009* (GIIC Act). The GIIC Act provides the Information Commissioner with regulatory powers including coercive powers.

To answer the question of 'Is the GIPA Act fit for purpose?' it is necessary to examine both statutes together with a thorough analysis of the extant systems, policies and practices of agencies that support the exercise of their functions under the GIPA Act.

Annual reports on the operation of the GIPA Act confirm that in some areas of mandatory proactive release agencies are performing well.¹⁴

However, one of the greatest challenges I have encountered in my soon to be 10 years in this office is risk identification within agencies. The vulnerabilities presented in agencies' operating environments inform our work to protect and promote the fundamental human right of access to information and require dedicated resources and skilled analysis.¹⁵ Examination of this nature is challenged by the requirement for the IPC to apply its limited resources judiciously. This demands a balancing of our reactive and proactive regulatory workloads given our jurisdiction over more than 250 agencies across five sectors. Our audit and monitoring systems have matured and increasingly we are harnessing technology to enhance efficiencies.

In 2021, the IPC was independently assessed as arguably the most efficient Australian regulator of information access and privacy rights against complaint management and review functions.¹⁶

In areas that are critical to good governance and integrity, we have conducted more resource intensive analysis of systems, policies and practices.

¹⁰ Currently only a factor against disclosure Table to section 14 of the GIPA Act

¹¹ Let the sun shine in – review of culture and accountability in the Queensland public sector, June 2022, Professor P Coaldrake

¹² Ss 6,7,8 of the GIPA Act

¹³ UNSW Research to be published

¹⁴ Compliance with general open access release requirements remains high at 84%, Report on the Operation of the GIPA Act 2021/22

¹⁵ Universal Declaration of Human Rights Art. 19

¹⁶ Operational Review of the Information and Privacy Commission, May 2021, p. 13-14

Those audits continue to reveal limited progress by agencies to institutionalise the GIPA Act's mandated pro-integrity measures. These mandatory requirements address the contemporary risks to integrity in modern governments.

Continuing low levels of compliance are identified in areas including:

- declarations of interests by councillors and key personnel in the Council sector,
- disclosure of major assets, acquisitions, properties and value by Departments appropriately classified for each financial year,
- disclosure logs, and
- other mandated open access information including contracts.

In 2015, I commenced proactive work to examine, report, and in conjunction with agencies remediate low levels of compliance with the three access pathways that stimulate release of information absent a formal application. Since that time, the IPC has published 20 information access compliance reports and others await publication. These reports provide a lens through which we can examine the systems and practices of agencies that reveal the level of organisational commitment to accountability and transparency. Additionally, we have developed and refined self-audit tools to assist agencies in efficiently and effectively identifying and remediating areas of low compliance.

Presented with largely suboptimal results more work is demanded and arguably new approaches facilitated by funded technology enhancements and contemporary regulatory powers.

The Information Commissioner's powers in relation to mandatory and proactive release do not readily align with her prescribed functions under the GIPA Act.¹⁷ Rather those powers support regulatory action in relation to the formal information access pathway. Additionally, regulation of agencies' actions under the formal access pathway is supported by data reporting requirements and benchmarks. It is also subject to statutory Guidelines and public reporting via the GIPA dashboard and annual reports.

The three remaining access pathways contain limited or no data collection.¹⁸ Further they are not facilitated by regulatory powers to reflect the importance of these pathways particularly those that mandate open access. Accordingly, data collection to reflect good administrative decision-making and regulatory powers including standards setting/code of practice and statutory instruments, such as a notice to comply, are required to establish and enforce standards of performance by agencies. The introduction of these powers under the GIPA Act would also support a more proportionate approach to the use of regulatory powers.

Currently, performance of these broad information release functions under the GIPA Act is subject to investigation by the Information Commissioner.¹⁹ Yet examination of that performance is not accompanied by responsive statutory powers to set standards and guide performance by agencies as an important first step in regulatory action.

The way forward

NSW is ideally positioned to modernise the GIPA Act and re-establish its reputation as a leader in the promotion of the right to access information. In conjunction with the Association of Information Access Commissioners (AIAC), the Open Government Partnership, UNESCO, the Centre for Law and Democracy and the Global Data Barometer (GDB), I have led the development and/or publication of the:

- Right to Information (RTI) jurisdictional compendium – comparing the features of right to information statutes operating throughout Australia
- RTI National Metrics to examine the operation of these statutes throughout Australia
- Key Features of RTI legislation agreed by the AIAC
- Citizen surveys to report the citizen experience of exercising their right to access information throughout NSW and Australia
- Principles to promote the proactive release of information agreed by the AIAC

¹⁷ Section 17 GIPA Act

¹⁸ Section 8 GIPA Act

¹⁹ Section 21 GIIC Act

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- Assessment of the GIPA Act against the internationally accepted RTI Index produced by the Centre for Law and Democracy
- First sub-jurisdictional assessment of the governance, capacity, availability and thematic application of government data under the GDB
- Engagement with Indo-Pacific Nations as the inaugural practice expert to promote access to information in the region.

Applying these valuable insights, NSW is well placed to modernise the GIPA and GILC Acts.

The IPC also requires augmentation to preserve its independence and ability to perform its functions free of budgetary, administrative, and political interference. Integrity agencies in NSW have, because of a Parliamentary Inquiry, achieved a necessary independent status and operating model. Whilst the IPC has the status of an integrity agency, it does not enjoy the same independent budgetary operating model, and this requires rectification.

Conclusion

There has been a clear and committed understanding of the importance of the role of the IPC by Ministers responsible for the GIPA and GILC Acts throughout my terms. The IPC's co-regulatory efforts have been embraced by other integrity offices and the positive professional relationships I have enjoyed with leaders of integrity agencies have also fortified our effectiveness.

Likewise, leaders from all regulated sectors have engaged productively with the IPC and generously shared insights. I am most grateful for their focus on information access and their responsiveness to the IPC.

Information access practitioners have engaged constructively with their work and the IPC. It has been a pleasure to see this voluntary group progress operational expertise across all sectors and effectively advocate for the promotion of the right to access information.

None of these achievements would have been possible without the commitment of every member of the IPC and the unfailing collegiality of the NSW Privacy Commissioner. The talent and appreciation of the promotion of rights by all IPC staff manifests each day in a productive and professional working environment that collectively strives for the best. There are also a number of largely unrecognised but indispensable contributors to the effectiveness of the IPC. Ms Rachel Jhinku and Ms Lynley Mattes are both dedicated and highly skilled officers who deserve special recognition. The leadership of Directors and constancy of the Director Investigation and Reporting, Ms Sonia Minutillo, over the years has embedded good practice from which we have collectively excelled.

This role has offered me unsurpassed purpose, reward, and joy. Each day in this office has heightened my appreciation of the role of integrity agencies in our democratic system of government and my gratitude for the opportunity to contribute to the NSW integrity framework in service of the public interest.



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