

## Information access in NSW – the present state and emerging trends

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#### Introduction

[Acknowledgment of traditional custodians]

This is my first speaking 'gig' in my new role as Information Commissioner of the IPC and I am thrilled that it is for a group of Records and Information Practitioners.

I need to open with a confession. I love records. This grew from my study of history in my BA, where I did as my Honours thesis a biography of the Renaissance diplomat, Sir Nicholas Throckmorton. My PhD was in legal history and it was the 'history' part that kept drawing me back into records and especially into the magic and mystery of manuscripts holdings and Archives Offices. The highpoint was perhaps during a sabbatical undertaken in London in the first months of 2003, when I was a Professor at Macquarie Law School and taking a break from being Dean.

I wanted to uncover the true history of the 18th century case that was the *fons et origo* of the legal doctrine of mutual wills – as it became known in the common law.<sup>1</sup> The journey took me to the reading room of the Public Record Office, in Kew, and into the wonderful mysteries of the court records. It was easy to be distracted by the work of others, especially those working on the Tudor Rolls, in white gloves, and serious posture, with special props and weights for these treasured tomes. The 18th century court documents I was looking at were large, vellum sheets, inscribed in at least something of a modern script. It was the combination of the work at the PRO and in the British Library and their collection of judicial records, that provided the foundation for some rather learned publications (if I do say so myself) on the doctrine.

Anyway, that is a far cry from responding to my brief for today. It may at least give me some 'cred' among this group!

And while the site for this infatuation may be different, the challenges are likely to be familiar and constant ones in the world of records and information management.

Similarly, in moving to the domain of State information access laws I am having to shift my vocabulary. I have operated in the 'FOI' world federally and in NSW before the 2009 legislation which transformed 'Freedom of Information' into 'Government Information (Public Access)' or GIPA. So now I am in GIPA world.

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<sup>1</sup> *Dufour v Pereira* (1769) 1 Dick 419; 21 ER 332.

In the next parts of my presentation, I will look at:

- the operation of NSW information access laws
- agencies' compliance requirements
- emerging trends shaping the future of information access governance.

### **Operation of NSW information access laws**

In this part of my presentation, I am drawing on the report that is required of my office each year in compliance with s 37 of the *Government Information (Information Commissioner) Act 2009: Report on the Operation of the Government Information (Public Access) Act 2009* (s 37 Report).<sup>2</sup>

The report compiles information submitted by NSW public sector agencies annually since 2010–11. The latest report, the 13th, was submitted and tabled on 20 May. It provides a snapshot of agencies' compliance for the reporting year as available on 30 January 2025.

The report is a comprehensive assessment of the operation of the right to information legislation in NSW and examines the performance of over 270 public sector agencies. It provides important guidance to policymakers and agency heads and promotes greater transparency for the people of NSW.

So, here are some snapshots of data.

The report notes that the number of valid applications received by agencies continued to increase, with access applications increasing a further 12% from 24,476 in 2022–23 to a new record of 27,485 in 2023–24.

When looking at the type of information applied for, outcomes for applications that sought partly personal and partly other information continued to increase significantly to 6,897 compared with 5,255 in 2022–23. This reflects a 277% increase from 2019–20 to 2023–24.

These results highlight the strong ongoing interest from the public in exercising their right to access government-held information.

Consistent with previous years, the number of invalid applications remained high. In 2023–24, invalid applications were equivalent to 12% of all formal applications received. Notably, the Council sector had the highest percentage of invalid applications this year at 21%.

However, invalid applications that subsequently became valid increased by 5% to 67%, indicating that efforts by agencies to help applicants make their applications valid have been effective.

Timeliness of decision-making has moderately increased across most sectors, which may be reflective of improved processes for dealing with applications. However, complaints about decision-making timeframes continue to be received by the Information and Privacy Commission, indicating opportunities for NSW agencies to review their internal processes for efficiencies and engage with IPC-published guidance on how the decision period is calculated and how and when extensions may be sought.

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<sup>2</sup> [Report on the Operation of the Government Information \(Public Access\) Act 2009: 2023–24.](#)

The right of review of GIPA access applications is an important mechanism in the GIPA framework, offering an opportunity for applicants to seek reconsideration of decisions made regarding access to information – through internal reviews, or external reviews by the Information Commissioner and by the New South Wales Civil and Administrative Tribunal (NCAT).

Overall, while review rates have remained stable in most sectors, the volume of external reviews by the Information Commissioner as a percentage of all reviews conducted declined moderately to 34%.

Furthermore, reviews where the Information Commissioner recommended that agencies reconsider their decisions moderately declined to 39%. Meanwhile, internal reviews as a percentage of all reviews increased moderately to 52% this year compared with 44% in 2022–23.

### **Agencies' compliance requirements**

Open access to certain information is a cornerstone of transparency and accountability in the public sector in NSW. Under s 6 of the GIPA Act and the GIPA Regulation, all NSW agencies are required to proactively make public a range of documents, known as 'Open Access information', unless there is an overriding public interest against disclosure of the information.<sup>3</sup> Open Access Information is to be publicly available free of charge on the agency's website (unless to do so would impose unreasonable additional costs on the agency).

Open Access information includes:

- an agency information guide, describing an agency's structure, functions, how those functions affect the public, the type of information held and how it is made publicly available
- documents tabled in parliament by or on behalf of an agency
- an agency's policy documents that are related to its functions
- a disclosure log of information released under formal access applications
- a register of contracts an agency has with private sector entities for \$150,000 (inclusive of GST) or more
- a record of the Open Access Information that is not made public due to an overriding public interest against disclosure.

The s 37 Report notes that compliance with Open Access information requirements has shown modest improvement, but remains a concern.

A desktop audit conducted across NSW government departments and selected smaller agencies found that 77% were compliant, up from 73% in the previous year.

This indicates small, ongoing progress, and highlights that nearly a quarter of agencies are still not meeting mandatory obligations and they need to take proactive steps to meet their obligations fully.

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<sup>3</sup> Taken from [Fact Sheet – Open Access Information for Agencies](#)

The report also identifies persistent gaps in compliance by NSW government departments with their three *Open Access* requirements under clause 6(2) of the GIPA Regulation. These include:

- major assets and acquisitions
- the total number and value of properties disposed of during the previous financial year
- the department's guarantee of service.

The IPC noted that while some departments are making efforts to improve, overall compliance with these specific requirements remains low. This signals a need for targeted strategies and stronger oversight to ensure that critical public information is consistently and transparently available to the community.

The s 37 Report includes an example.<sup>4</sup>

*Issue Highlight: Audit of the open access requirement for grants administration information*

From 1 July 2023, the GIPA Regulation required agencies to comply with additional Open Access requirements in relation to grants administration information. Information is to be published on the prescribed website, [www.nsw.gov.au/grants-and-funding19](http://www.nsw.gov.au/grants-and-funding19) (the grants website).

The IPC's desktop audit identified problems with the grants website. It does not facilitate searching for grants issued by a specific agency, nor does it allow grants to be identified by agency.

In addition to keyword searching, searches can be conducted by location (postcode or suburb), by category of grant recipient (business, individual, local government, not-for-profit), by subject matter, or by status (open, opening soon, closed, or announcements).

However, a keyword search using an agency's name, did not produce a comprehensive list of grants relevant to that agency. Direct searches were conducted of department websites to identify information about the grants they administered. This information obtained from these searches was used to find information on the grants website to verify agency compliance with the requirement to publish grants information.

For smaller agencies, the same approach was less successful, as only 31% of the sampled smaller agencies provided grants information on their websites.

The inability to search for grants information by agency limits the ability of the IPC to monitor agency compliance with this Open Access obligation. The IPC will seek enhancements to the functionality of, and information on, the grants website during 2025.

**Emerging trends shaping the future of information access governance**

**Automated Decision-Making & AI**

The report tabled in 2024 by the NSW Ombudsman, *A map of automated decision-making in the NSW Public Sector* (Ombudsman's report),<sup>5</sup> provides instructive insights on a trend that has well and truly emerged for us all in information access and management world.

<sup>4</sup> [Report on the Operation of the Government Information \(Public Access\) Act 2009: 2023–24](#), page 12.

<sup>5</sup> [A map of automated decision-making in the NSW Public Sector](#).



An automated decision-making (ADM) system describes a computerised process that either assists or replaces the judgment of human decision-makers. Increasingly, NSW government information is held in digital form, and decision-making and services are increasingly automated. This has implications for how governments can improve outcomes for people seeking access to government information.<sup>6</sup>

As these systems are adopted by governments, people will increasingly be subject to actions and decisions taken by, or with the assistance of, ADM systems. This can lead to considerable grief where not managed properly – remember the Robodebt Royal Commission.

To fully exercise their rights, it is important that individuals are able to access information on *how a decision is made* and what information was used to reach that decision.

However, currently the NSW public has a limited visibility over the use of ADM by NSW agencies.

The Ombudsman reported several key findings in his report:

- there is increasing availability of information on agency websites regarding AI and ADM, however it is of limited quality
- voluntary reporting will not meet calls for a comprehensive register of ADM (and AI) systems used by the NSW government
- most of the ADM systems reported through the project are currently not subject to any ADM (or AI) specific regulatory framework.
- publication of information on agency websites may, in some but not all cases, be sufficient to inform members of the public who are affected by decisions made with the support of ADM
- being able to ‘see’ what ADM is being used is one thing; being assured that it is being used lawfully and in accordance with good administrative practice is another.

When reflecting on the use of AI and ADM by the public sector, particularly as it relates to decision-making, there are critically important considerations which need to be made.

The object of NSW information access legislation is to open government information to the public to maintain and advance a system of responsible and representative democratic government.<sup>7</sup> The rights of people to access government information remain applicable where government uses technology to provide services and inform decisions.

Agencies should keep this in mind when they are required to explain how a decision was made, as this information can be the subject of an access application.

Accurate recordkeeping and details greatly assist in this process.

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<sup>6</sup> Adapted from: [Fact Sheet – Automated decision-making, digital government and preserving information access rights – for citizens.](#)

<sup>7</sup> [Fact Sheet – Automated decision-making, digital government and preserving information access rights – for citizens.](#)

AI systems which are not clearly explainable, or which do not transparently and comprehensively document the basis and evidence for their output, should not be relied upon for automated decision-making processes that affect individuals.<sup>8</sup>

Agencies that are seeking to use AI systems to make decisions that will impact individuals should carefully consider the legal basis underpinning the activity before proceeding and should ensure that there are appropriate opportunities for human review throughout the decision-making process.

Remember Robodebt. It's not quite 'remember the Ides of March', but of similar impact.

### **Emerging issues for AI**

AI and ADM can help in records management – to enhance searches for records, better categorise records and maintain records. This is an interesting consideration for the future, particularly as it relates to information access applications and increasing the speed at which records can be retrieved. I note that there are interesting sessions to come during the day of examples here.

I think in a few short years we will be having a very different conversation about the use and impact of AI as it becomes standard use across the digital space.

### **Digital records**

We know that agencies are utilising new technologies and digital platforms to carry out their business or in providing services to the public.<sup>9</sup>

For example, many agencies use a range of digital platforms (including X, Yammer and Microsoft Teams) as part of their business.

The messages, forums and posts created using these platforms are digital records under the GIPA Act if they have been used for conducting government business.

Similarly, messages created in messaging apps (such as WhatsApp, Facebook Messenger and WeChat) are digital records if the messages have been used for conducting government business.

If an agency decides that these technologies are going to be used to conduct business within the agency or externally with clients, then the agency is creating digital records within these systems. The agency will need to determine how it will capture and store these records and make them available if required under the GIPA Act.

Agencies need to have in place systems and governance arrangements that communicate to staff expectations and responsibilities associated with the use of these technologies under the GIPA Act.

However, not all digital records are classed as government information under the GIPA Act.

The GIPA Act states that government information is information contained in a record held by an agency or held by a person in their capacity as an officer of the agency.

For example, a public sector employee may access their personal email account on a device provided by the agency. Information contained in the officer's personal email

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<sup>8</sup> Taken from: [Guide to undertaking Privacy Impact Assessments on AI systems and projects](#).

<sup>9</sup> Drawn from: [Fact Sheet – Digital records and the GIPA Act](#)

account is not government information under the GIPA Act because the agency does not hold the emails and the emails are held in their personal capacity, not as an officer of the agency.

But if the officer conducts government business using their personal email account then those emails are considered to be State records and must be returned to the agency. Using personal email accounts to conduct government business is strongly discouraged.

Increasingly as service delivery methods evolve, an agency may have an agreement with a private sector contractor to provide services to the public on its behalf.

In these circumstances, the digital records held by the contractor may also be classified as government information under the GIPA Act even though the agency may not hold the record.

This is because the Agency has an immediate right of access under the GIPA Act. Agencies and contractors should be aware that access applications can be made for this information and plan accordingly. The GIPA Act also outlines certain circumstances where information is not to be classified as government information held by an agency.

### **Joint Commissioner Regulatory Desktop review of Agency Information Guides and Privacy Management Plans**

The use of technology, in particular Artificial Intelligence (AI) and Automated Decision Making (ADM) has the capacity to impact and effect both the information access and privacy rights of individuals.

This review is a joint initiative of the Acting Information Commissioner and Privacy Commissioner to understand the extent to which information on the use of ADM or AI by public sector agencies is included in publicly available Agency Information Guides and Privacy Management Plans.

The review will focus on the areas of transparency, notification and accountability and supports the Commissioners' shared regulatory priority of safeguarding rights through informed oversight (**Strategic Priority 1**). Agencies across the regulated sectors will be included in this baseline review.

### **Concluding thoughts**

Records management needs constant vigilance. There is no room for complacency.

We are at a pivot point of seizing the opportunities of new technology as our friends in information management.

Information access is a key aspect of an effective and accountable democracy and to be cherished. Integrity and accountability are still our pole stars in this domain.

For me, I am embracing learning all the legal niceties of the GIPA Act and interrogating the world of 'OPIADs' and 'COPIADs'. What joy!

I look forward to seeing you whenever that next time may be with some stories of my experience under my belt by then.