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Government accountability in the era of Freedom of Information and GIPA – the role of the Information Commissioner and the IPC

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Introduction

[Acknowledgment of traditional custodians]

I will open with a confession. I am a fan of the BBC Series, ‘Yes Minister’ and ‘Yes, Prime Minister’ that ran between 1980 and 1988. This was a period of intense consideration of issues going to public access to government information, the movement for ‘open government’, as it was called. I have the compendium of the series compiled by its writers.¹

The very first episode of this masterful BBC series is titled ‘Open Government’. It was screened on 25 February 1980 as a pilot for the series. Jim Hacker is newly installed as an MP and appointed as Minister for Administrative Affairs. The Minister’s Principal Private Secretary, Bernard Woolley, joins Sir Humphrey Appleby, Permanent Secretary of the Ministry for Administrative Affairs and Sir Arnold Robinson, Cabinet Secretary, at the club, ‘for an after-dinner coffee while they drank their after-dinner brandy’. The two senior bureaucrats were encouraging young Bernard to ‘head off’ the Minister ‘on this Open Government nonsense’. In that conversation, Sir Humphrey said to Sir Arnold, ‘Bernard said that he thought that we were in favour of Open Government. I hope I have not over-promoted young Bernard, He still has an awful lot to learn.’ Later, Sir Arnold pointed out, ‘with great clarity, that Open Government is a contradiction in terms. You can be open – or you have government.’

What this clever scriptwriting tapped into were the inherent tensions in the idea of public access to government information and the workings of the Westminster system and its robust civil service. It provides a nice backdrop for my presentation on my role as Information Commissioner and the legislation that I oversee.

I will open with some remarks on my career journey to the IPC, then look at the FOI landscape in Australia through an historical lens, and provide some insights into my legislative role in the Information and Privacy Commission.

My journey to the IPC

On 2 June 2025 I commenced my appointment as CEO and Information Commissioner of the Information and Privacy Commission NSW. This is my third position as a statutory officeholder. My first was as Commissioner, then President, of the Australian Law Reform Commission, from February 2007 to July 2017. My second was as President of the Australian Human Rights Commission, for seven years, commencing on 30 July 2017, concluding at the

¹ *The Complete Yes Minister: The Diaries of a Cabinet Minister by the Right Hon James Hacker MP*, Jonathan Lynn and Antony Jay, eds, BBC Books, 1989.



end of July 2024. Then after a long sabbatical – much needed – I was delighted to accept appointment to the IPC.

The shift from the federal to the State arenas has been an interesting one – both in terms of the differences in jurisdiction in a federal system, and in the way the public service operates. I love learning new things, so this is fun and rewarding in both aspects.

Learning new law is always exciting, and a little scary, to be honest. So I just dive in and burrow!

I have been involved in information and privacy issues both in a practical sense, in my role as Dean of two law schools, and in a more conceptual and policy sense in the work of the ALRC.

I operated in the 'FOI' world in NSW before the 2009 legislation which transformed 'Freedom of Information' into 'Government Information (Public Access)' or GIPA. As Dean of a law school, the world of FOI presented itself in the context of people wanting access to information about promotions – usually about why they didn't get one and what the committee and their referees may have said about them, and indeed about other candidates. Most of this, as you would expect, was not accessible to disgruntled applicants.²

In my work at the ALRC, I led inquiries into secrecy laws,³ and legal professional privilege.⁴ Other Commissioners led the massive privacy inquiry,⁵ and the inquiry into the design of a cause of action for serious Invasions of privacy (2014).⁶

So I have roamed widely and at different points on the information spectrum between information access and secrecy, and in protecting privacy, and now I have the opportunity to play an active role in aspects of this at the state level, as a regulator.

My current role is a curious one. I am both Information Commissioner and CEO. Both my office as Commissioner and the IPC as an agency, were established as part of a package of legislative reforms to FOI and privacy in 2009.⁷ The new office of Information Commissioner was brought together with the existing office of the independent Privacy Commissioner within the new agency, the IPC, which commenced on 1 January 2011 to support both Commissioners in fulfilling our legislative responsibilities and functions. Together, we have jurisdiction over NSW government agencies and departments, local councils, NSW universities, NSW state-owned corporations and some private health service providers. As part of our regulatory work, we undertake reviews and complaints in relation to information access and privacy.⁸

To put the functions of my role as Information Commissioner in context, I will take you back a few decades – with Sir Humphrey watching on with a raised eyebrow and supercilious smile.

The FOI landscape in Australia – history and trends

The impetus towards opening up government through FOI legislation in Australia began in the late 1960s and early 1970s.⁹ It became an election issue in 1972 when Gough Whitlam,

² 'Confidentiality, Shadow Boxing and Proper Processes—the FOI Challenge in Recruitment and Promotion Processes in Australian Universities', an invited contribution to *Leadership in Legal Education Symposium VII*, (2007) 38(2) *University of Toledo Law Review* 599–615, a collection of essays, published annually, written by law school deans on subjects related to legal education.

³ *Secrecy Laws and Open Government in Australia* (2010): [Secrecy Laws and Open Government in Australia \(ALRC Report 112\) | ALRC](#).

⁴ *Privilege in Perspective: Client Legal Privilege in Federal Investigations*: [Privilege in Perspective: Client Legal Privilege in Federal Investigations \(ALRC Report 107\) | ALRC](#).

⁵ *For Your Information: Australian Privacy Law and Practice* (2010): [For Your Information: Australian Privacy Law and Practice \(ALRC Report 108\) | ALRC](#), led by Professor Les McCrimmon.

⁶ *Serious Invasions of Privacy in the Digital Era (ALRC Report 123) | ALRC*, led by Professor Barbara McDonald of the University of Sydney, now Emeritus Professor.

⁷ [Who we are](#). *Government Information (Information Commissioner) Act 2009* (NSW), *Government Information (Public Access) Act 2009* (NSW).

⁸ [Information and Privacy Commission New South Wales; Fact Sheet - Frequently asked questions for citizens: What the IPC can and cannot do](#).

⁹ There is an excellent summary in ALRC, *Open Government: A Review of the Freedom of Information Act 1982* (1995): [Freedom of Information Act 1982 - open government | ALRC](#).

then leading the opposition Labor Party, claimed that the government's monopoly of knowledge had 'led to bad decisions and bad government'.¹⁰

After the election, the new Labor government acted on its promise in 1982, introducing the *Freedom of Information Act 1982* (Cth).¹¹ It granted members of the public access to information about government decision-making as well as access to personal records held by government agencies. Each state followed suit, introducing legislation based on the federal Act.

In NSW, after the lapsing of a 1983 Bill introduced by the Wran Labor Government, it was a Coalition Government that succeeded with the enactment of the *Freedom of Information Act 1989* (1989). As with the move towards the federal Act, it was preceded by an electoral platform that included a commitment to enact FOI legislation.¹²

In his report on the FOI Act in NSW in 2008, the NSW Ombudsman, Bruce Barbour, observed that,

As with many other Westminster systems, the idea of freedom of information for NSW was first raised by a political party in opposition. It took almost ten years of debate and a change of government to see it enacted.¹³

The first-generation FOI Acts were still cautious ones. The customary constraints of the Westminster system of responsible government still rested heavily on them.¹⁴ The conventions of this system were seen to demand official secrecy.¹⁵

Perhaps the embodiment of this approach is seen in 'Yes Minister'. Indeed, the very first episode of this masterful BBC series is titled 'Open Government'. It was screened on 25 February 1980 – 46 years ago tomorrow – as a pilot for the series.

[*In relation to the White Paper, titled Open Government, an initiative championed by the new MP and Minister for Administrative Affairs, Jim Hacker, Sir Humphrey explained that they were calling the White Paper Open Government 'because you always dispose of the difficult bit in the title. It does less harm there than on the statute books.'*¹⁶]

Governments have grown since the idea of open government was first mooted; and technology has accelerated the ability to generate and keep large amounts of information – and particularly government information. And as the reach of government expanded, there was increasing pressure to ask questions about what government was doing.¹⁷

By knowing 'whether a government's deeds match its words', open government helps to provide checks and balances to discourage corruption and misconduct. As commented by the House of Lords in *R v Shayler*.

Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved ... Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant.¹⁸

[*The amusing counterpoint to this is Sir Humphrey's viewpoint, in recording the conversation with Sir Arnold Robinson, the Cabinet Secretary. 'Bernard claims that the citizens of a*

¹⁰ G Whitlam, *It's Time for Leadership: Policy Speech for the Australian Labor Party delivered at the Blacktown Civic Centre* (1972). The speech can be accessed at [It's Time: Gough Whitlam's 1972 Election Policy Speech - AustralianPolitics.com](https://www.austlii.edu.au/au/other/dfat/special/whitlam/policy_speech.html).

¹¹ Based on the US *Freedom of Information Act* of 1966. The passage of the Australian FOI legislation, after much committee work, is considered in ALRC Report 77, [3.3]–[3.7]. The introduction of the New South Wales legislation is described in Anne Cossins, *Annotated Freedom of Information Act New South Wales: History and Analysis* (1997), ch 1.

¹² K Smark, *Freedom of Information and Privacy in Australia*, 3rd ed, 2024, [1.10].

¹³ NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989*, a special report to parliament under s 31 of the *Ombudsman Act 1974*, February 2009, 1.

¹⁴ See the consideration of this in the ALRC Secrecy Report, ch 2.

¹⁵ Freedom of Information Review Panel, *The Right to Information: The Report of the FOI Independent Review Panel* (2008), 158.

¹⁶ *The Complete Yes Minister*, 21.

¹⁷ G Terrill, *Secrecy and Openness: The Federal Government from Menzies to Whitlam and Beyond* (2000), 43.

¹⁸ *R v Shayler* [2003] 1 AC 247, [21].

democracy have a right to know. We explained that, in fact, they have a right to be ignorant. Knowledge only means complicity and guilt. Ignorance has a certain dignity.'^{19]}

Access to information as a human right

The idea of responsible representative democracy reflected obligations to those who were electors in that democracy – to citizens – through the right and responsibility to vote in elections and referendums once they reach the age of 18. International law, added another dimension to this, in framing rights vested in individuals as *humans*, and not because of citizenship.

My 7 years leading the Australian Human Rights Commission impressed on me the importance of thinking about government accountability and privacy through a lens of *individual* rights, underpinned by Australia's commitments in ratifying the key international human rights treaties – in this context, the *International Covenant on Civil and Political Rights* (ICCPR).²⁰

The ICCPR, described as 'one of the most important human rights conventions of the United Nations era',²¹ was adopted by the United Nations General Assembly on 16 December 1966. Australia ratified it in 1979, under the Coalition government of Malcolm Fraser. Article 19(2) provides:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The Human Rights Committee of the United Nations has commented that the right to freedom of expression includes:

Not only freedom to impart information and ideas of all kinds but also freedom to seek and receive them regardless of frontiers and in whatever medium, either orally, in writing or in print, in the form of art, or through any other media of his choice.²²

This freedom to seek and receive information is the link to FOI laws. Crucially, you do not need to be a citizen to invoke rights to access government information.²³ The NSW legislation from the first iteration framed this as 'a legally enforceable right' in a person.²⁴ This inclusive approach aligns with broader human rights principles, which affirm that access to information is a right not limited by nationality.

FOI Act 1989 (NSW) – a pull model

Each Act of the 'first generation' Acts, like the FOI Act 1989 (NSW) embodied a 'pull' model of information access, based on a request by an individual to access a document held by an agency or Minister, usually via a formal request.

It reflects a historical understanding, at the time of the Act's creation, that the right to information meant a right to request and receive information from public bodies.²⁵

First generation FOI laws also included a long list of exemptions, designed to protect 'essential public interests'.

Minor amendments were made between 1989 and the major revision that produced the GIPA

¹⁹ *The Complete Yes Minister*, 21.

²⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

²¹ B Opeskin and D Rothwell (eds), *International Law and Australian Federalism* (1997), 16.

²² United Nations Human Rights Committee, *General Comment No 10: Freedom of Expression* (Art 19), HRI/GEN/1/Rev.9/Vol.1 (1983)

²³ For example, non-citizens can apply under the *Freedom of Information Act 1982* (Cth) in Australia: [Make a freedom of information request | OAIC](#).

²⁴ FOI Act 1989 s 16(1); GIPA Act s 9(1).

²⁵ Office of the Victorian Information Commissioner, *Inquiry into the Freedom of Information Act 1982*, Submission, 15 January 2024, [69]: [LRP-Full-Review-of-FOI-Act-OVIC-submission-December-2023.pdf](#).



Act. One notable feature of amendments in 1992²⁶ was the inclusion of two considerations about argued public interests. The fact that disclosure of information ‘may cause embarrassment to, or loss of confidence in, the Government’ or ‘might be misinterpreted or misunderstood by any person’ were ‘irrelevant and must not be taken into account’.²⁷

[This is what I might call an ‘anti-Sir Humphrey’ provision. Defending his advocacy for keeping the public ignorant on the workings of government, he said to Sir Arnold Robinson, Cabinet Secretary, ‘This is not just a defence mechanism for officials, of course. Bernard must understand that he would not be serving his Minister by helping him to make a fool of himself. Every Minister we have would have been a laughing-stock within his first three weeks in office if it had not been for the most right and impenetrable secrecy about what he was up to.’²⁸]

Amendments to the FOI Act extended its reach to local government in 1993. Then in 2004, a new exemption was included for documents relating to counter-terrorism measures; and in 2006 an extra disclosure provision was added requiring disclosure of information about government contracts.

Reforming FOI legislation, once introduced, proved a bit of a battle. Bruce Barbour, NSW Ombudsman, in reviewing the FOI Act in 2008, refers to a ‘distinct cooling of political interest and support for effective FOI legislation’ – with the exception of Sweden. ‘Releasing information goes against the natural instincts of government’:

FOI legislation creates a fundamental and significant conflict of interests for government and senior public officials. On the one hand, they have a duty to implement the legislation in accordance with its terms and spirit. However, implementing the legislation will quite often have a serious and occasionally damaging impact on their personal and political interests.²⁹

[Perhaps this is an example of what Sir Humphrey referred to as ‘the law of Inverse Relevance: the less you intend to do about something, the more you have to keep talking about it.’³⁰]

Barbour’s report,³¹ and a further consultation process via draft exposure bills,³² led to its repeal and replacement by the *Government Information (Public Access) Act 2009*, which came into effect on 1 July 2010.

The GIPA Act is an example of ‘second generation’ FOI laws. (Similarly, the amended Commonwealth act and the Queensland Act.) Barbour had recommended calling the legislation the ‘Open Government Information Act’ – OGIA – which, like GIPA, does not sit ‘trippingly on the tongue’, as Hamlet said.³³

The ‘**second generation**’ of FOI laws are ‘push models’. These essentially reverse the onus from a person to request, to an agency to provide. The GIPA Act creates a framework under which there is a presumption in favour of disclosure of government information, rather than one under which information would be disclosed subject to formal request only.

A ‘push’ model contains more extensive requirements for agencies to proactively publish and informally release information on an ongoing basis. Under a ‘push’ model, such mechanisms

²⁶ *Freedom of Information (Amendment) Act 1992* (NSW).

²⁷ FOI Act (NSW) s 59A; now contained in GIPA Act s 15(c) and (d).

²⁸ *The Complete Yes Minister*, 21.

²⁹ NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989*, a special report to parliament under s 31 of the *Ombudsman Act 1974*, February 2009, 2. Patrick Birkinshaw has observed, similarly, that ‘FOI laws will always be unpopular with governments in power and some of the officials who serve them. That is probably the true test of their importance.’ P Birkinshaw, ‘Freedom of Information and Openness: Fundamental Human Rights’ (2006) 58(1) *Administrative Law Review* 177, 217.

³⁰ *The Complete Yes Minister*, 21.

³¹ NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989*, a special report to parliament under s 31 of the *Ombudsman Act 1974*, February 2009.

³² See Second Reading speech introducing GIPA Act and GII Act – the Hon Tony Kelly on behalf of the Hon John Della Bosca, Legislative Council, 24 June 2009.

³³ *Hamlet*, Act 3 scene 2.

are prioritised, with formal requests for information positioned as a last resort.

The idea of publishing information, both as required under these second-generation laws and proactively, gets ahead of GIPA requests – reducing the need to make and respond to formal requests.

In the second reading speech introducing the package of legislative reform in NSW in 2009, it was said:

The bills mark a paradigm shift. Our public sector must embrace openness and transparency and Governments must forever relinquish their habitual instinct to control information. This is generational change – reform long overdue.³⁴

This does not mean that everything is accessible. Rather than using the first-generation language of ‘exemptions’, the GIPA Act allows access *unless* there is an overriding public interest against disclosure (or ‘OPIAD’). However, the Act provides for the *equivalent of exemptions* in the form of a list of factors against disclosure and a list of factors in respect of which there are ‘conclusive presumptions of an overriding public interest against disclosure’ – or COPIADS. Balancing competing interests is again at the heart of the release assessment.³⁵

Schedule 1 of the GIPA Act includes the list of examples where there is a conclusive presumption of an overriding public interest against disclosure. Cabinet information is a key one.³⁶ This is not surprising in the context of the history of Westminster systems and the convention of collective ministerial responsibility, preserving the confidentiality of processes leading up to the decisions of the executive arm of government. The convention allows for the full and frank debate between Ministers in the course of deliberations, while preserving the unanimity of the ultimate decisions of the executive.

While all Australian information access jurisdictions provide for exemptions or limitations in the disclosure of information relating to the Cabinet, ‘across the ditch’, in New Zealand, the approach is more open, with access to Cabinet decisions by default.

As you might expect, the various elements of the COPIADs have been subject to NCAT consideration. The designation as ‘cabinet information’ expires after 10 years.³⁷ An amendment in 2018 clarified that information is not Cabinet information to the extent that it consists solely of ‘factual material’ unless it might reveal information about a Cabinet decision or a position that a particular Minister takes.³⁸

One significant shift between the old FOI and the new GIPA regime is the abolition of the ‘conclusive certificate’, by which a Minister could issue a certificate stating that certain information was exempt, thereby preventing external review. [*Sir Humphrey could have designed it!*]

Because the GIPA Act does not contain any provision allowing conclusive certificates – and instead emphasises openness, transparency, and independent review – NSW agencies cannot issue conclusive certificates for information access decisions.

Returning to the issue that I had to deal with as a Dean, access to confidential referee reports, under the FOI Act confidential information was protected through blanket exemptions. So a referee report marked ‘confidential’ was likely to attract the exemption. Under the GIPA Act there is no automatic ‘exemption’ for documents marked confidential, and a request for access must be considered through the lens of public interest factors against disclosure, under s 14, such as that release would prejudice the supply of confidential information.

³⁴ See Second Reading speech introducing GIPA Act and GIIC Act – the Hon Tony Kelly on behalf of the Hon John Della Bosca, Legislative Council, 24 June 2009.

³⁵ K Smark, *Freedom of Information and Privacy in Australia*, 3rd ed, 2024, [5.4]. GIPA Act s 12 includes a note setting out illustrations of public interest considerations in favour of disclosure.

³⁶ See IPC, [Information Access Guideline 9 - Cabinet Information](#).

³⁷ GIPA Act, Sch 1, cl 2(2)(b).

³⁸ GIPA Act, Sch 1, cl 2(4).

The most significant aspects of the reforms in accessing government information brought in by the GIPA Act were the introduction of three additional pathways (beyond the single, formal access application pathway provided under the FOI Act) for the disclosure of government information. These are: mandatory proactive release; authorised proactive release; and informal release.

The different pathways, in particular the first two 'push' pathways, have generated a significant shift by government agencies towards openly publishing their information guides, policy and procedure documents, disclosure logs and contracts registers. Many categories of government information are openly and freely available on government websites.

The Information Commissioner can review a decision by agencies under the GIPA Act – called an 'external review'. While I can make recommendations in respect of the agency's decision, I cannot order an agency to release information or refund payment of processing charges. I do not have a power of determination – unlike some of my sister agencies across the country.

Some of the things people refer to the IPC for review include, eg, where an agency says they do not hold the information sought, which means can they show they have undertaken reasonable searches to see if they have.³⁹

If people are unhappy with IPC decisions, there is an appeal pathway to NCAT – the NSW Civil and Administrative Tribunal.⁴⁰ Then the appeal pathway is potentially within NCAT itself and then to a Court.⁴¹ NCAT has a full merits review role and can make the 'correct and preferable decision' in the circumstances.⁴²

In recent years, my predecessors in the role of NSW Information Commissioner have called for legislative reform of the GIPA Act in the annual report under s 37 of the GIPA Act in a number of areas, for example:

- a. modernising provisions to address the challenges of digital government. For example, agencies use of algorithms, digital archives, coding and contracting with third party digital services to store, use and produce government information
- b. improving transparency in grants administration through publication of grants on a centralised grants website
- c. improving transparency of Cabinet decision making
- d. adding a new public interest factor in favour of disclosure for the care and protection of the environment
- e. enhancing regulatory powers with respect to proactive and informal release mechanisms in the GIPA Act. For example, improving data collection, standards setting, and a power to issue a compliance notice
- f. adding an offence provision to safeguard information from destruction, concealment or alteration.⁴³

Other reforms may be of a structural kind, based on comparative analysis of commission models in other jurisdictions and the powers of the Information Commissioner. A key difference in NSW from other Australian jurisdictions is that decisions of the Information Commissioner are not binding.

In July 2017, the NSW Department of Justice conducted a review of the operation of the GIPA Act and GIIC Act. With the ten-year anniversary of that review in July 2027, and the 20-year anniversary of the legislation in 2029, these are singular points to latch onto for another

³⁹ *Colefax v Department of Education and Communities (NSW)* [2013] NSWADT 75.

⁴⁰ [Fact Sheet - Your review rights under the GIPA Act.](#)

⁴¹ [Appeal an NCAT decision | NSW Civil and Administrative Tribunal.](#)

⁴² *Administrative Decisions Review Act 1997* (NSW) s 63.

⁴³ See NSW IPC, *Report on the Operation of the GIPA Act 2020–2021*; NSW IPC *Report on the Operation of the GIPA Act 2021–2022*.



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review.

In concluding, I will quote remarks of former Prime Minister Bob Hawke:

Information about government operations is not, after all, some kind of 'favour' to be bestowed by a benevolent government or to be extorted from a reluctant bureaucracy. It is, quite simply, a public right.

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