



18 February 2021

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Dear Ms Gough

NSW LAW REFORM COMMISSION CONSULTATION PAPER - OPEN JUSTICE: COURT AND TRIBUNAL INFORMATION: ACCESS, DISCLOSURE AND PUBLICATION

Thank you for the opportunity to make a submission to the NSW Law Reform Commission's consultation on Open Justice. This submission provides general commentary and specific responses to identified proposals and questions contained within the consultation paper on *Open Justice: Court and tribunal information: access, disclosure and publication*.

About the Information and Privacy Commission NSW

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* (PIIP 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). These rights are realised by agencies authorising and encouraging proactive public release of government information; and by giving members of the public an enforceable right to access government information.

We note that information relating to the judicial functions of courts and tribunals in NSW is excluded from the operation of both the PIIP Act (section 6) and HRIP Act (section 13), and is covered by a conclusive presumption of overriding public interest against disclosure under the GIPA Act. However, the GIPA Act and NSW privacy laws do provide useful models for balancing access, disclosure and publication of information with privacy and other public interest considerations.

Non-disclosure and suppression: statutory prohibitions

The consultation paper asks whether there should ever be automatic statutory prohibitions on publishing or disclosing certain information. We note that there are circumstances where there will be strong public interest considerations against disclosure of court information. Chapter 3 of the consultation paper identifies several areas where statutory prohibitions of disclosure currently apply, for example, to protect the identities of children and young people, complainants of certain sexual offences and people involved in mental health proceedings.

Automatic prohibitions against disclosure in narrow circumstances can exist within a framework that promotes open access to information. For example, under the GIPA Act, there is a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure. Schedule 1 of the GIPA Act sets out information for which there is conclusive presumption of overriding public interest against disclosure (COPIAD). Where a COPIAD does not apply, section 13 of the GIPA Act sets out a public interest test for agencies to apply:

*There is an **overriding public interest against disclosure** of government information for the purposes of this Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.*

Accordingly, when deciding whether to release information, decision makers must commence the public interest test from the position of acknowledging the presumption in favour of disclosure of information. Therefore, unless there is an overriding public interest against disclosure, agencies must provide the information¹.

We note that section 6 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) includes a public interest test in relation to suppression and non-publication orders. Under this test, a court “must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice”. The framing of the public interest test under the GIPA Act provides a useful model of a test that is more strongly in favour of disclosure.

Privacy protections for personal information

We note section 16 of the uncommenced *Court Information Act 2010* specifies that the PPIP Act and HRIP Act would not apply when providing access to court information under the Act. However, the Information Protection Principles under the PPIP Act and Health Privacy Principles under the HRIP Act may still provide a helpful framework for courts and tribunals to refer to when deciding whether to disclose records containing personal information.

There is a strong public interest in ensuring access to court information, which is crucial to open justice. However, there can also be a competing public interest in not disclosing court information containing personal information. The interaction between the GIPA Act and the PPIP Act, which is well established within both statutes, provides a useful example of how these competing public interests may be balanced. Sections 5 and 20(5) of the PPIP Act recognise that the GIPA Act is not limited by the PPIP Act and therefore information may be released under the GIPA Act (either proactively or in response to an application).

However, under the GIPA Act, there is a public interest consideration against disclosure of information if disclosure could reasonably be expected to contravene an IPP under the PPIP Act or a HPP under the HRIP Act. The GIPA Act also facilitates privacy protection through mechanisms including creation of a new record (section 75) and the deletion of information from a copy of a record to which access is to be provided (section 74). We note similarities in the uncommenced provisions of the Court Information Act, with section 18(2) specifying that court rules can ensure personal information is not included in “open access” court information:

- a) by providing access to a copy of the court record containing open access information, from which personal identification information has been deleted or removed, or

¹ The IPC has published a fact sheet on the application of the public interest test under the GIPA Act, which is available here: <https://www.ipc.nsw.gov.au/fact-sheet-what-public-interest-test>

- b) by providing for the filing or tendering of court records that have had personal identification information deleted or removed from the record or contained in a separate record.

Open access and restricted access information

The access rules under the Court Information Act would categorise all court information as either “open access information” or “restricted access information”, with some variation in the definition of “open access” between civil and criminal proceedings. In both jurisdictions, written submissions made by parties, transcripts of proceedings in open court and records of any judgments given would be considered open access information (section 5). Defining certain court information as “open access” would promote open justice, by confirming automatic access to some court information for the public, researchers and the media.

Any court information that is not open access information would be “restricted access” information, as would other information including personal identification information (section 6). We note that section 9(2) of the Court Information Act sets out matters a court may take into account when deciding whether to grant leave for access to restricted information. We broadly support the matters listed in this section, which include considerations of the public interest in access being granted, the impact on the principle of open justice and the extent to which any individual’s privacy will be compromised. There is recognised value in applying principles to guide public interest decisions. While section 9(2) would not require courts to take the listed matters into account, it does provide guidance to courts on how to exercise their discretion, which could promote greater consistency in relation to access to restricted information.

By way of comparison, section 12 of the GIPA Act includes a non-exhaustive list of public interest considerations in favour of the disclosure of government information. Section 14 of the GIPA Act sets out a list of public interest considerations which are the only considerations (apart from a COPIAD) that may be taken into account by an agency as public interest considerations against disclosure. The Information Commissioner is empowered under both sections 12 and 14 to issue guidelines about the listed public interest considerations for the assistance of agencies.

Digital technology and open justice

We note that the increasing use of digital technology creates both opportunities and challenges for open justice. Rights oversights by both the Information Commissioner and the Privacy Commissioner are also impacted by new and emerging technologies and our advice is often sought by government agencies in relation to digital projects. Since late 2020, the Information and Privacy Commission has been preparing advice for the Minister for Customer Service on the privacy and information access implications of projects seeking funding from the Digital Restart Fund. Under section 10 of the *Digital Restart Fund Act 2020*, the Minister must obtain and have regard to the advice from the Information Commissioner and the Privacy Commissioner.

In advising the Minister on these projects, we have identified several common information access and privacy issues which may also be relevant in the context of the increasing digitisation of court information and the move towards virtual hearings. These issues include:

- Inequality of access, noting that some citizens may lack the digital literacy or necessary equipment to access digital-only services.
- The importance of ensuring the preservation and accessibility of all records, including physical resources, digitised copies and born-digital records. We note that while many of the principal obligations under the *State Records Act 1998* do not apply to a court or tribunal in respect of its judicial functions, many courts and tribunals have their own record keeping and access obligations under regulation.

- The security risks associated with consolidating large amounts of sensitive records and information.
- The need to consider the privacy impacts and implement mitigation strategies where new technology is being used and personal and/or health information is being handled.
- The involvement of third party vendors/contractors in projects who may have access to government information and/or personal information (for example, providers of new platforms, software and/or cloud storage solutions) and the potential dilution or displacement of legislated rights in these arrangements.

The strategies we have recommended to mitigate these risks include:

- Where possible, maintaining non-digital means of access for those who are unable to or choose not to access digital services.
- Ensuring that agencies continue to comply with their obligations under the GIPA Act and privacy laws even as the nature of their service delivery evolves and makes increasing use of digital technology.
- Ensuring that agencies have appropriate data breach strategies and cybersecurity protections for safe storage of information, and that staff receive targeted training.
- Undertaking a privacy impact assessment where a project involves personal and/or health information.
- Ensuring that procurement contracts with third party providers include appropriate privacy provisions and comply with the requirements under section 121 of the GIPA Act, which requires an agency outsourcing service provision to include in the contract an immediate right of access for citizens to prescribed information.
- Ensuring that citizens are aware of the information held by agencies and importantly the publication of policies that impact citizens including the manner in which decisions are made.

We hope that these comments are of assistance to you. Please do not hesitate to contact us if you have any questions. Alternatively, your officers may contact [REDACTED], [REDACTED] on [REDACTED] or by email at [REDACTED].

Yours sincerely

[REDACTED]

Elizabeth Tydd
CEO, Information and Privacy Commission NSW
Information Commissioner
NSW Open Data Advocate

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Privacy Commissioner