



29 March 2023

Privacy Act Review Team
Attorney-General's Department
4 National Circuit
Barton ACT 2600

By email: privacyactreview@ag.gov.au

Dear Privacy Act Review Team

RESPONSE TO THE PRIVACY ACT REVIEW REPORT (REVIEW REPORT)

In recognition of the legislative and operational nexus between the *Privacy and Personal Information Protection Act 1998* (NSW) (PIIP Act) and the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act) this response briefly ventilates issues that may fall within matters to be considered by the proposed working party set out in the discussion paper.

The relevant recommendations addressed in this submission are: **3.2; 19** and **29**.

Proposal 3.2 - Amend the objects of the Act to recognise the public interest in protecting privacy

The object of the GIPA Act is:

In order to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective, the object of this Act is to open government information to the public by—

- (a) *authorising and encouraging the proactive public release of government information by agencies, and*
- (b) *giving members of the public an enforceable right to access government information, and*
- (c) *providing that access to government information is restricted only when there is an overriding public interest against disclosure.¹*

In this context the GIPA Act:

- enshrines a presumption in favour of disclosure;
- promotes the public interest factors in favour of disclosure of information;
- provides a non-exhaustive list of factors in favour of disclosure; and

¹ GIPA Act section 3(1)

- provides that the presumption in favour of disclosure of government information will only be displaced if they are outweighed by the public interest considerations against disclosure.²

The GIPA Act also establishes information that is 'excluded' by prescribing under Schedules 1 and 2 information for which there is a conclusive presumption against disclosure of information.

With the exemption of this prescribed information other types of information are subject to an exhaustive list of public interest considerations against disclosure that must be weighed in the public interest test.³

Factors that weigh against the disclosure of information include: reveal(ing) personal information; and/or contravene(ing) an information protection principle under the PPIP Act or a Health Privacy Principle under the *Health Records and Information Privacy Act 2002*.

The Review Report canvasses introduction of a public interest in favour of privacy at Recommendation 3.2. Careful consideration should be given to the impact this proposed amendment may have upon extant statutes operating within other jurisdictions to avoid duplicating privacy related factors against disclosure. The effect may be to elevate privacy factors against disclosure to a status of 'excluded information' or similar which was clearly not envisaged by the legislators responsible for existing regimes.

Proposal 19.1 - Privacy policies should set out the types of personal information that will be used in substantially automated decisions which have a legal or similarly significant effect on an individual's rights

As a second tranche right to information statute the GIPA Act reflects the indicators prescribed in the [UNESCO Right to Information Rating Index](#) and provides for the proactive release of prescribed information. This statutory approach differs from the existing *Freedom of Information Act 1982*.

The potency of the GIPA Act is achieved by four pathways to access information: two proactive and two reactive pathways that form a virtuous circle.⁴

Significantly the GIPA Act provides that agencies must adopt an Agency Information Guide (AIG) and must update their AIGs at intervals of not more than 12 months and if requested consult with the NSW Information Commissioner.⁵:

Agency policies must be included in their AIGs and in particular include information that:

- (a) describes the structure and functions of the agency, and
- (b) **describes the ways in which the functions (including, in particular, the decision-making functions) of the agency affect members of the public, and**
- (c) specifies any arrangements that exist to enable members of the public to participate in the formulation of the agency's policy and the exercise of the agency's functions, and

² GIPA Act sections 12 and 13

³ GIPA Act section 14

⁴ GIPA Act section 6, 7, 8 and 9

⁵ GIPA Act section 21

- (d) identifies the various kinds of government information held by the agency, and
- (e) identifies the kinds of government information held by the agency that the agency makes (or will make) publicly available, and
- (f) specifies the manner in which the agency makes (or will make) government information publicly available, and
- (g) identifies the kinds of information that are (or will be) made publicly available free of charge and those kinds for which a charge is (or will be) imposed.

Within NSW these provisions are recognised by agencies and integrity entities as requiring agencies to proactively release information describing the manner in which their decisions are made within all five regulated government sectors and in circumstances of government outsourcing.⁶ The GIPA Act is technologically neutral, and machine enhanced decision-making is captured under the GIPA Act.⁷

These provisions operate under the permissive access regime enshrined in the GIPA Act designed with the object of opening government. Restrictive access regimes may not serve the purpose of provision of information as effectively. In this regard the Australian Human Rights Commission Report [A National Human Rights Act for Australia 2023](#) (Human Rights Report) recognises the benefits and principles that underpin Article 19 of the Universal Declaration of Human Rights relevant to access to government information: *Dissemination of Information, Enhancing participation and trust*. These principles squarely align with the object of the GIPA Act and other permissive regimes which operate in a cohesive way to promote access to information and curtail withholding of government information.

This alignment of Article 19 and the GIPA Act is demonstrated by the relationship between the object of the GIPA Act and the aspects of the Human Rights Report dealing with dissemination of information:

Relevant information should be proactively disseminated by making it available in a manner appropriate to local conditions and taking account of the special needs of individuals and groups that are marginalized or discriminated against. This should include:

- (a) *Providing information free of charge or at reasonable cost and without undue restrictions on its reproduction and use both offline and online;*
- (b) *Providing both technical information for experts and non-technical summaries for the general public;*
- (c) *Disseminating information in clear, usable, accessible, age-appropriate and culturally appropriate formats, and in local languages, including indigenous and minority languages. This may entail publications in Braille, easy-to-read and plain language formats;*

⁶ GIPA Act section 121

⁷ [Ireland v Central Coast Council \[2022\] NSWCATAD 366](#); and [O'Brien v Secretary, Department Communities and Justice \[2022\] NSWCATAD 100](#)

- (d) *Disseminating the relevant information as widely as possible, including through the website of the relevant public authority or authorities if that method is effective. Other dissemination channels may include local print media, posters, billboards, mass media (television or radio) and other online sources;*

Rights holders should have access to key information to allow effective participation in monitoring and evaluating progress in the implementation of decisions.

Additionally, as recognised in the Human Rights Report and the GIPA Act monitoring, auditing, investigating and reviewing the operation of agency disclosures of information should be undertaken independently by a specialist oversight office, as provided by the GIPA Act and the *Government Information (Information Commissioner) Act 2009*. Like most information access statutes, the GIPA Act requires agencies to furnish the NSW Information Commissioner with data on an annual basis⁸. This data is published by the Information Commissioner and informs the proactive compliance activities of the NSW Information Commissioner. In this context the specialist knowledge and skills together with the requirement to promote the object of the GIPA Act⁹ ensure that the Information Commissioner oversees compliance with the requirements of the GIPA Act in a holistic and performance informed manner.

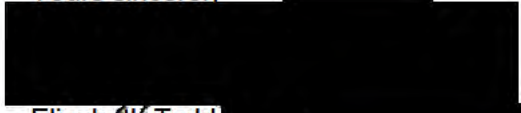
Proposal 29.3 - Establish a Commonwealth, state and territory working group to harmonise privacy laws, focusing on key issues

As described key issues for consideration include the extant legislative frameworks operating within jurisdictions that may be impacted by the proposed reforms. Under the GIPA Act privacy is recognised as a consideration against disclosure. However, the preeminence of the right to access information is recognised under the PPIP Act.¹⁰ Similarly the definition of personal information differs under both statutes.

Operationally agencies are required to balance information and privacy rights in undertaking their statutory functions. The establishment of the Information and Privacy Commission (IPC) as a single source of advice to agencies and citizens demonstrates that this important balance can be achieved. The specialist expertise the IPC has developed by integrating both statutory functions under two independent Commissioners, its effectiveness and efficiency provide a powerful example of careful legislative and structural balance.

The opportunity to provide a submission in relation to this important reform is appreciated. I can be contacted on (02) 4823-4600 or by email at elizabeth.tydd@ipc.nsw.gov.au if you have any questions.

Yours sincerely


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⁸ GIPA Act section 125

⁹ GIPA Act section 17(a)

¹⁰ PPIP Act sections 5 and 20(5)