



information
and privacy
commission
new south wales

SUBMISSION TO THE INQUIRY INTO THE FREEDOM OF INFORMATION ACT 1982 (VIC)

Submission by the Information and Privacy Commission NSW

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The Commissioner's signature has not been included in this submission to facilitate public access to the submission, manage security risks, and promote availability in accordance with the *Redacting signatures on public facing documents Practice Guide* published on the IPC website.

The Information and Privacy Commission NSW (IPC) welcomes the opportunity to provide a submission to the Inquiry into the *Freedom of Information Act 1982 (Vic)*.

About the IPC

The Information and Privacy Commission NSW (IPC) oversees the operation of privacy and information access laws in New South Wales.

The Information Commissioner has responsibility for overseeing the information access rights enshrined in the *Government Information (Public Access) Act 2009 NSW (GIPA Act)* and exercises functions under the *Government Information (Information Commissioner) Act 2009 NSW (GIIC Act)*. The Information Commissioner also holds the role of NSW Open Data Advocate, in which capacity she provides advice across the NSW Government on nonpersonal data that should be released to the public.

As an independent statutory office holder, I have framed my submissions to reflect objective measures for assessment of better practice in enshrining information access rights. Accordingly, the submissions traverse published information and guidance to facilitate the enlivenment of information access rights particularly in light of the new and emerging risks to that right presented within the context of contemporary government. The submissions also recognise the pivotal role of the right to access information as an effective pro-integrity mechanism that also facilitates public trust through government transparency and accountability. Finally, the submissions reflect the dynamic nature of the 'public interest test' which operates to reflect matters of public interest to each generation and if applied effectively, that test will endure the test of time.

The effectiveness of the Act's current policy model, which is based on formal requests for information, and other options available, including options utilised in other jurisdictions

1. Article 19 of the UN Declaration of Human Rights establishes the parameters which enliven the right to access information which are enshrined within the object of this statute.
2. The object of the GIPA Act recognises the essential role that the right of access to government information plays in promoting and preserving a fair and effective representative system of democratic government.

Section 3 Object of Act

(1) 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.

(2) It is the intention of Parliament—

(a) that this Act be interpreted and applied so as to further the object of this Act, and

(b) that the discretions conferred by this Act be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information.

3. The Organisation for Economic Co-operation and Development (OECD) describes Open Government as: the transparency of government actions, the accessibility of government services and information, and the responsiveness of government to new ideas, demands, and needs. Australia's commitment to open government is described as being built upon three key principles: strengthening access to information, collaborating with citizens on policy and service delivery, and making government more consultative and participative.
4. The GIPA Act and the GIIC Act provide the statutory framework to ensure that the right to access information across four pathways (two proactive and two reactive) operate effectively under a regulatory regime to drive cultural and operational reform in promoting open government in NSW.
5. The potency of the right to access information in NSW is achieved through the combination of the four access pathways under the GIPA Act. The pathways combine to facilitate the public release of information and preserve the human right of access to information for individuals. The aggregate effect of these pathways ensures that agencies can provide government information to the public promptly and at low cost.

6. The four pathways should operate as a virtuous circle:
 - i. The first pathway, mandatory proactive release, provides a core set of agency information that must be publicly available and free of charge. For example: agency policies, details of the information held by the agency, government contracts with the private sector, disclosures of interest in the local council sector, and travel in the Ministerial sector.
 - ii. The second pathway, authorised release, enables and encourages agencies to proactively release additional information such as reports or business cases. It is this ongoing release of information that should be included in each agency's update of its publicly available Agency Information Guide (AIG). An AIG sets out all of the information the agency makes available. This information will increase year on year. Therefore, yearly reviews are required to promote currency of the information provided and to ensure that agencies are aware of the information that they hold.
 - iii. The third pathway, informal release of information, enables citizens to request information informally. For example, in person or during a telephone call. It also allows agencies to impose conditions on the release of information, decide the format in which information is provided, and delete information that might render the information inaccessible because of public interest considerations against disclosure. Information released informally should also be considered for proactive release to the public broadly and included in the AIG.
 - iv. The fourth pathway, formal application, provides transparent and consistent procedures and timeframes for citizens making applications and agencies dealing with applications. Notices of decisions are required, and the pathway provides rights of review if a citizen is not satisfied with the agency's decision. Information released to one person through the formal release pathway should also be considered for proactive release to the public broadly and included in the AIG. This process is facilitated by the agency's disclosure log.
7. Objective and established measures are available to the Committee to assess the operation of the Act against other regimes, enlivening the right to access information. These include:
 - i. [National metrics](#)
 - ii. [Community attitude surveys](#)
 - iii. [RTI Rating](#)
 - iv. [Jurisdictional compendium](#)
 - v. [Key Features](#).
8. During my term as Information Commissioner, the IPC published research commissioned to promote the right to access information and ensure that it operates effectively. Similarly, I have examined the operation of the GIPA Act utilising 10 years of data derived from the five sectors regulated under the GIPA Act.
9. The following publications may be of assistance to the Committee:

- i. [Advancing the objects of the Government Information \(Public Access\) Act 2009 \(NSW\): an international comparative evaluation of measures used to promote government information release \(2015\)](#)¹
- ii. [Conditions Enabling Open Data and Promoting a Data Sharing Culture \(2017\)](#)²
- iii. [Informal Release of Information under Section 8 of the Government Information \(Public Access\) Act 2009 \(NSW\)](#)³
- iv. [NSW Information Commissioner's 10 Year GIPA Data Analysis Overview 2010-2020](#).⁴

Mechanisms for proactive and informal release of information, including the effectiveness of information publication schemes

10. Proactive release of information is designed under the GIPA Act to respond to identified risks in each sector, thereby operating to serve a pro integrity purpose. For example, declarations of interest in the local government sector, travel in the ministerial sector, and acquisition and disposal of assets in the government department sector. In this way, the public and integrity agencies can engage with and interrogate data, that ultimately serves the public interest in an open, fair, and accountable government.
11. Additionally, in an environment of disinformation, government can re-establish trust by ensuring that government data holdings are a 'single source of truth'.
12. The Association of Information Access Commissioners (AIAC) is committed to principles to support proactive disclosure of information as articulated in our publication of the: [Statement of Principles to support proactive disclosure of government-held information](#).
13. In 2020/21 the IPC reported a 30% increase in formal applications for government information. In the face of such a dramatic increase in formal applications the Information Commissioner commissioned [research by UNSW](#) to examine the least understood of the four access pathways – informal release. The aim of the research into the informal access pathway was to:
 - i. better understand its use
 - ii. identify its benefits to agencies and citizens
 - iii. provide guidance, and
 - iv. potentially decrease the need for more resource intensive formal applications under the GIPA Act.
14. A number of mechanisms facilitate the effective operation of proactive and informal access schemes by reducing resource costs as compared to reactive release schemes. A range of these mechanisms are included in the following IPC publications:
 - i. [Information Access Guideline 6: Agency Information Guides](#)

¹ [ADVANCING THE OBJECTS OF THE GOVERNMENT INFORMATION \(PUBLIC ACCESS\) ACT 2009 \(NSW\):](#)

² [Report Conditions Enabling Open Data and Promoting a Data Sharing Culture March 2017.pdf \(nsw.gov.au\)](#)

³ [Informal Release of Information under Section 8 of the Government Information \(Public Access\) Act 2009 \(NSW\) May 2023.pdf](#)

⁴ [NSW Information Commissioner's 10-Year GIPA Data Analysis Overview 2010-2020 - September 2021](#)

- ii. [Fact Sheet: Open access information under the GIPA Act – agency requirements](#)
- iii. [Fact Sheet: Open access information](#)
- iv. [Checklist: Open access information under the GIPA Act and GIPA Regulation – agency requirements](#)
- v. [Information Access Guideline 11 - Informal Release of Information](#)
- vi. [Fact Sheet - Informal release of information.](#)

The information management practices and procedures required across government to facilitate access to information; and opportunities to increase the disclosure of information relating to government services using technology

15. Digital government promotes the proactive release of information between agencies. However, it must also promote the proactive release of information to citizens. There are several case studies that identify risks to the right to access information presented by digital government.
16. I have presented them to the NSW government as follows:
 - i. [Social Housing Rental Subsidy Calculation](#)

A social housing tenant sought information regarding her rental rebate calculated under an outsourced contractual arrangement. In these outsourcing arrangements the information accessible is narrowed both by contract and under the GIPA Act. As a result, the information sought was not available to the social housing provider, the department, or the citizen. Accordingly, neither an explanation for the subsidy provided or a challenge to the rebate was available to the citizen. This case also highlights limitations under the GIPA Act which distinguish between the provision of contractual services and those services which inform government decision-making.⁵
 - ii. [Examination of the utility of strip searches in identifying and prosecuting the use of illegal substances](#)

Redfern Legal Centre made an application to obtain information about strip searches conducted by NSW Police. The information was found not to be 'held' and therefore not provided because it was contained in different digital containers and required aggregation to be produced. The Tribunal accepted that producing this information would be a substantial and unreasonable application of the resources of NSW Police. The case also highlights that contemporary record keeping practices including those that are inspired by privacy protection principles may alienate the legislated right to access information.⁶

⁵ [O'Brien v Secretary, Department Communities and Justice \[2022\] NSWCATAD 100](#)

⁶ [Redfern Legal Centre v Commissioner of Police \[2021\] NSWCATAD 288](#)

iii. [NSW COVID data shared with the Federal Government](#)

The applicant sought information from a NSW government department regarding COVID data that had been shared with another Australian government department. The Tribunal applied existing authority regarding government information held in digital form in determining that digital information is not held by a government agency if it requires treatment to bring it into existence. The Tribunal also found that it is only in circumstances where access is proposed to be granted that the discretion to make a new record arises. In these circumstances, if information is found not to be held by an agency there is no requirement to provide access to that digital information.⁷

iv. [Outsourcing software used to determine flood impacted land](#)

A retired civil engineer with a working knowledge of how flood depths are calculated sought two “hard copy” documents relating to flood depth level reports about his property, being an engineer’s plan (‘item 1’) and engineering calculations “of the quoted Depths 0.2 and 2.1 m” (‘item 2’)⁸. The Council used an aerial software program acquired externally to calculate the flood depths rather than traditional human calculations. This information was important to the Applicant who sought to develop his property. The Tribunal was satisfied that item 1 was not held. The Tribunal ordered the Council to provide further reasons that might assist in understanding the ‘software’ decision making process.

Each of these cases highlight unique adverse impacts on vulnerable communities. In part, they also demonstrate the asymmetrical availability of information between government and citizen, favouring government.

17. As governments progressively implement digital services, leading to the proliferation of new risks from machine enhanced decision-making, there is an increasing need to promote the right to access information.
18. At the request of the former Minister for Customer Service I conducted a scan of the regulation of Artificial Intelligence and its impacts upon the right to access information: [Scan of Artificial Intelligence regulatory landscape, October 2022](#).
19. The scan considers the regulatory environment in NSW and the treatments applied to risks arising from AI within this jurisdiction. Ultimately, the regulatory scan makes recommendations to preserve information access and privacy rights.
20. In summary, my recommendations to government relevant to extant information access laws regarding AI, were to:
 - i. ensure mandatory proactive disclosure of the use of AI
 - ii. ensure that open access information includes a statement of use, and a description of the operation of the AI
 - iii. expand information access rights under government contracted services to AI used for government decision-making
 - iv. include the use of AI as a factor in favour of disclosure of information.

⁷ [Ooi v NSW Ministry of Health \[2023\] NSWCATAD 107](#)

⁸ [Ireland v Central Coast Council \[2022\] NSWCATAD 366](#)

21. I also recommend that government:
- i. Include clauses in contracts for the provision of AI to the NSW Government covering:
 - a. government/purchaser right to audit/audit logs
 - b. notification requirements in circumstances of adverse impacts including complaints or legal action; access to user manuals; training data
 - c. retain government data inputs
 - d. address intellectual property rights
 - e. require monitoring to ensure the currency, explainability, and transparency of AI functions.
 - ii. Accelerate AI capability development (incl. a human in the loop approach) within the NSW public sector through enhanced relationships with industry and academic experts
 - iii. Establish a live repository of AI, use purpose, outcomes, and host agency to facilitate real time monitoring
 - iv. Ensure GIPA Act annual reporting on open access requirements includes a statement describing the AI application, how it operates, and a general description of its use by agencies, to allow oversight and compliance monitoring by the Information Commission and others
 - v. Facilitate a whole of government approach to ongoing monitoring of the application, operation and output of AI systems deployed by NSW agencies
 - vi. Engage at a national and international level to:
 - a. promote consistency of regulation
 - b. sound governance
 - c. influence marketplace behaviours, and
 - d. further consider the harmful and potentially prohibited uses of AI.

For further information about the IPC visit www.ipc.nsw.gov.au.