ACCESS ALL AREAS

Timely release of information is crucial for access to justice, says NSW Information Commissioner Elizabeth Tydd. However, the latest report shows mixed results. **DOMINIC ROLFE** reports.

IN June 2009, the then NSW Premier, Nathan Rees, seemed to be in the mood for regime change. As he introduced the Government Information (Public Access) Bill, he told the NSW Parliament that these "historic reforms" would fire "a fundamental freedom of information revolution … and [that] governments must forever relinquish their habitual instinct to control information".

Nearly seven years on from Rees' rousing speech, a new report from the NSW Information Commissioner, Elizabeth Tydd, shows the results of that revolution under the *Government Information (Public Access) Act 2009* (GIPA Act), that came into force on 1 July 2010. The report shows that, for some agencies, those old habits are proving difficult to shake.

It is the third report by the Information and Privacy Commission (IPC) on the GIPA Act and in her overview, Tydd notes four key trends:

- declining information release rates;
- internal reviews increasingly upholding an agency's original decision;
- increasing applications for external reviews, including by the Information Commissioner; and
- improved timeliness by agencies regarding requests to access information.

But beyond the somewhat lumpy results, Tydd believes the report reveals an important evolution in the IPC's work.

"The first report to be tabled was on the first three years of operation and was data-driven," Tydd says. "The second report started the conversation around how the GIPA Act works and the notion of open government.

"The significant change in this report, and I suspect in the IPC's operation more broadly, is that we've had to become more strategic. We've had to implement, as we are with success, a more risk-based approach to our regulatory endeavours, one that is informed on the basis of data and information to identify the greatest areas of non-compliance and really strive to address those in a very strategic and targeted manner."

As distinct from the Freedom of Information system it replaced, the GIPA Act sets out a fundamental and explicit presumption in favour of public disclosure of information for the five sectors it regulates.

The GIPA Act also sets out four pathways to achieve this: mandatory proactive release, authorised proactive release, informal release, and formal access applications. Tydd now wants to focus on maximising the effect of all four pathways, not just the formal pathways.

"If we think about major assets and how they're utilised, then the contract registers for local councils, universities, State government and State-owned corporations all demand reporting," says Tydd.

"The reporting acts as a regulatory shield, because the sectors are better equipped to deal with malfeasance and fraud. We built on what the ICAC had previously done and over seven years they had six major reports into procurement mismanagement, malfeasance and fraud."

Tydd was a neurological nurse before studying law and worked as an investigator with the NSW Health Care Complaints Commission and in-house counsel for the NSW Medical Board before moving into quasi-judicial roles, including being Assistant Commissioner of the Office of Fair Trading and Executive Director at the Office of Liquor Gaming and Racing. "That has to be the greatest gift to any career development," she says. "It was an absolutely amazing and rich policy environment."

While the GIPA Act provides the IPC, an independent regulator, with the powers of a Royal Commission and the (rarely used) power to compel the production of information, it's the carrots rather than the sticks that keep Tydd interested.

"One of the reasons I find this work as stimulating as I do is because the regulatory model is not an express, coercive model," she says. "It's one that demands cultural change. To achieve that cultural shift, you do it through partnerships, through education, through collaborative engagement."

Tydd points to the work NSW Police has done in developing its ability to deal with applications for information as well as the release of information. In the 2014/15 year that the report analysed, the NSW Police Force and the Roads and Maritime Services accounted for 55 per cent of the 12,914 valid applications received by agencies (5,443 and 1,666 applications respectively).

"The digital age has made a huge difference. The public wants services such as Amazon to tell them about the books they might like to read. And are they going to expect that sort of thing from local and State Government? Yes."

ELIZABETH TYDD, NSW INFORMATION COMMISSIONER

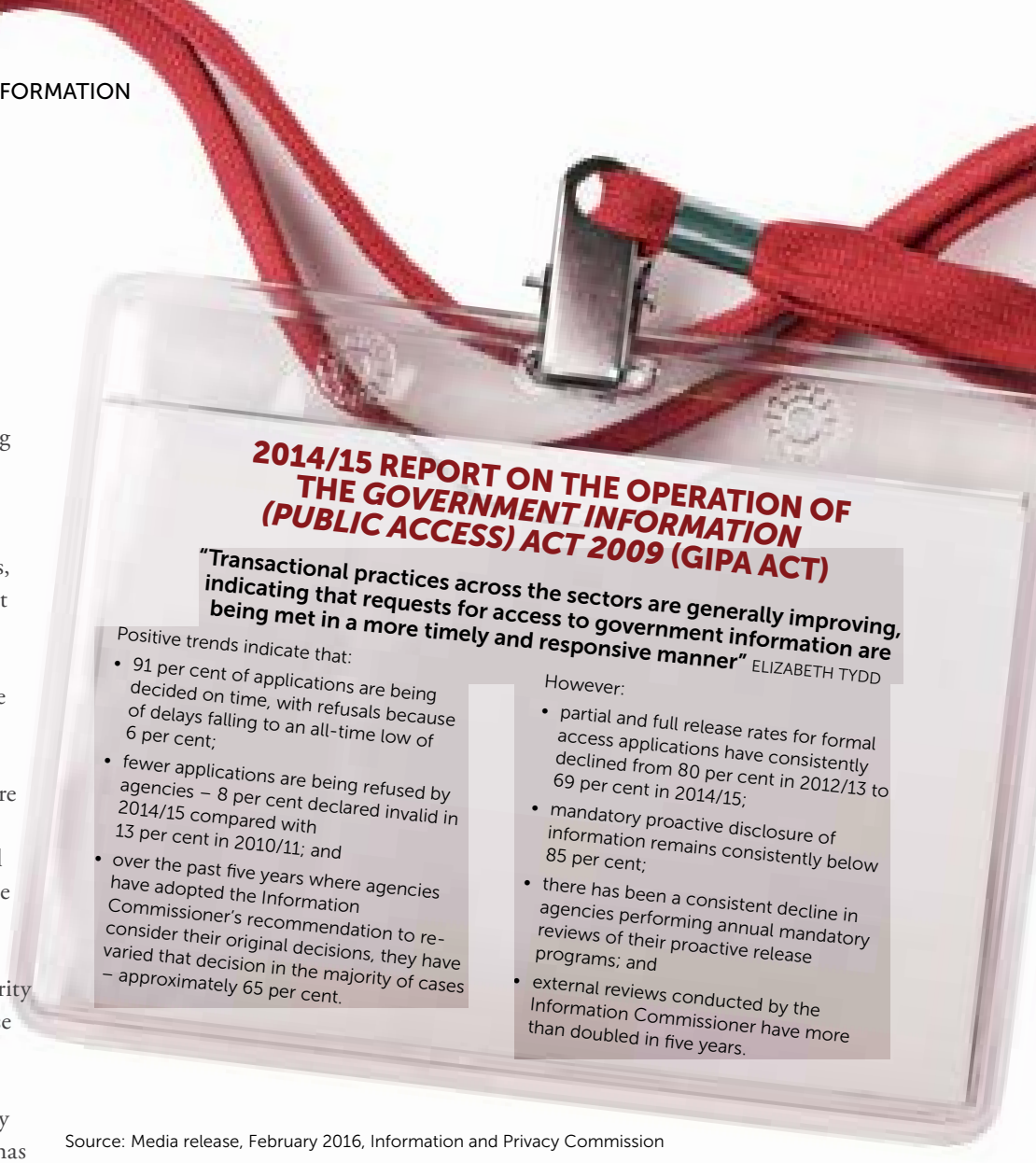
"Before the GIPA Act, NSW Police's capacity to deal with these applications both from a systems and cultural perspective was very limited," she says. In 2013/14, for example, the proportion of applications decided within the time frame was 71 per cent. A year later, that had increased to 93 per cent.

"The increase in timeliness overall has been heavily influenced by the work we've done with NSW Police and the work they've done internally to ensure there are no longer a large number of deemed refusals (decisions not made within statutory time frame)," says Tydd. "That's been a significant cultural shift for them that has significantly impacted compliance across the board."

With the largest single group of applicants being legal representatives on behalf of their clients (42 per cent) this also has a direct relation to the application of justice.

"Information access and the regime for information access needs to be timely and affordable, like all determinative systems," says Tydd. "The GIPA Act sets very accessible, strict time constraints – decisions need to be made in 20 days and timeliness has improved significantly. From that perspective, getting access to information in a timely, low-cost manner can be a pathway in a broad sense to early resolution of matters."

Tydd believes the timeliness also makes it an effective mechanism for solicitors and, more broadly, an effective mechanism to have in a system of justice. "It is a step within a judicial system that allows access to justice more broadly because it is affordable, timely and increasingly becoming more efficient," says Tydd. "The broader consideration of other materials or the provision of information may also alert legal representatives to the need to acquire additional information to better meet their legal or professional obligations."



Source: Media release, February 2016, Information and Privacy Commission

Balancing the requirements for the release of information are the two categories of public interest considerations against disclosure – conclusive presumption of overriding public interest against disclosure and other overriding presumptions against disclosure, known by the somewhat bewildering abbreviations, CPOPIADs and OPIADs. The most commonly used CPOPIAD is legal professional privilege (32 per cent) followed by the consideration for the care and protection of children (29 per cent). Within OPIADs, two-thirds of the factors against disclosure were considerations of individual rights, judicial processes and natural justice. But the authority to use these presumptions has seen a number of recent decisions.

"Increasingly, this body of authority is guiding decision-makers to realise that those presumptions can't be applied in a blanket manner," says Tydd. "They have to be applied very judiciously and the subject matter has to absolutely and demonstrably attract those factors. This body of authority is helping from a cultural perspective as well as a legal perspective."

But with information rates in decline, the IPC and Tydd have some serious work ahead of them. Levels of mandatory proactive disclosures remain consistently below 85 per cent and rates of full and partial releases in response to applications fell from 80 per cent in 2013/14 to 69 per cent for 2014/15. Tydd acknowledges that cultural change will take time but is optimistic that the next, more strategic phase of the IPC will zero in on problem areas. "The sectors wanted us to provide them with thought leadership, with authoritative advice and examples of how information release is being achieved internationally or by their counterparts," says Tydd.

"They wanted to know what the building blocks for success are and to guide the leadership. Leadership is definitely one area of focus. Another is systems and ownership and accountability, so we're making sure that that information is reaching the appropriate people with the responsibility for information management."

And while regulation may be an effective driver for change, a generational shift has also meant that increased disclosure will be demanded by the public. "The digital age has made a huge difference," says Tydd. "The public wants services such as Amazon to tell them about the books they might like to read. And are they going to expect that sort of service from local and State government? Yes, and I think the public transport apps that use previously tightly held information to give the public live, up-to-date data are a perfect example of the public wanting to and being able to access government information and data.

"We have a wealth of information and it's a government-held strategic asset. It needs to be realised like any strategic asset, which means it needs to be understood and accessed." **LSJ**