

## Statutory Review:

*Government Information (Public Access) Act 2009*

*Government Information (Information Commissioner) Act 2009*

JULY 2017

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Statutory Review **Government Information (Public Access) Act 2009** and  
**Government Information (Information Commissioner) Act 2009**

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## Executive Summary

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- 0.1 The *Government Information (Public Access) Act 2009* (**the GIPA Act**), and the associated *Government Information (Information Commissioner) Act 2009* (**the GIIC Act**), both commenced in 2010. Together, these Acts were designed to foster change in the way New South Wales (**NSW**) agencies make government information available to members of the public, and contribute to a cultural shift in the way agencies and members of the public think about 'open government'.
- 0.2 Unlike the earlier *Freedom of Information Act 1989* (**the FOI Act**), repealed in 2009, the GIPA Act created a framework under which there was a presumption in favour of disclosure of government information, rather than one under which information would be disclosed only subject to formal request. To facilitate disclosure, the GIPA Act provides four pathways for accessing government information; formal access applications (as under the FOI Act), as well as mandatory proactive release, authorised proactive release and informal release.
- 0.3 In accordance with section 130 of the GIPA Act and section 48 of the GIIC Act, the responsible Minister (the Attorney General) was to conduct a review of the Acts as soon as possible after the period of five years since their assent. The review was to consider whether the objects of the Acts remain valid, and whether their terms remain appropriate for securing those objectives.
- 0.4 The Department of Justice (**the Department**) undertook the statutory review of the GIPA Act and the GIIC Act on behalf of the Attorney General. In conducting the review, we received submissions and carried out broad consultation, details of which are outlined at Appendix B (discussions of submissions refer to their authors by their relevant titles at the date of submission).
- 0.5 The information we gathered from submissions and consultations revealed that the GIPA Act and GIIC Act are generally well-supported, the new pathways the GIPA Act created to access government information are useful and effective, and the Acts are operating efficiently. We have concluded that the objectives of both Acts remain valid, and their terms remain appropriate for securing those objectives.
- 0.6 A range of views were put to the Department on various aspects of the GIPA Act; we received few comments or suggestions with respect to the GIIC Act.
- 0.7 We have made 18 substantive recommendations, designed to provide greater clarity about the operation and objectives of the GIPA Act for both agencies and applicants. These recommendations seek to:
  - Modernise some aspects of the GIPA Act (for example, giving agencies greater discretion to accept access applications electronically)
  - Reduce compliance burdens for agencies (for example, in relation to open access information), and

- Provide more certainty for applicants in how their access applications will be handled (for example, reducing circularity in review processes).
- 0.8 We have also made an 19<sup>th</sup> recommendation in the body of the report. This recommendation is to the effect that a number of technical amendments be made to the GIPA Act and GIIC Act (included at Appendix A).
- 0.9 We expect that these amendments will help ensure the GIPA Act and GIIC Act continue to promote open government in NSW.

## Recommendations

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### Recommendation 1

Amend clause 3 of Schedule 1 to the GIPA Regulation to exclude development applications (and associated documents) lodged before the commencement of the GIPA Act from the definition of 'open access information'.

### Recommendation 2

Amend the GIPA Act to clarify that, in a section 80(m) review, the onus is on the authorised objector to prove that the reasons for the objection outweigh the public interest in including the information in the disclosure log.

### Recommendation 3

Amend section 41 of the GIPA Act so:

- Agencies have the discretion to accept access applications lodged electronically without having to seek prior approval from the Information Commissioner
- Access applications can be made with either a postal address or an electronic address for correspondence
- Access applications must include the applicant's name.

### Recommendation 4

Amend Division 2 of Part 4 of the GIPA Act to:

- Allow the partial transfer of an access application between agencies where the agency that originally received the access application holds some, but not all, of the information requested
- Allow agencies that receive partial transfers to impose processing charges (but not application fees) for processing the relevant part of the application.

### Recommendation 5

Amend Division 3 of Part 4 of the GIPA Act to specifically authorise agencies to consult with other agencies for the purpose of assisting the first agency to reach a decision on whether an overriding public interest against disclosure exists.

### **Recommendation 6**

Amend the definition of 'working days' in clause 1 of Schedule 4 to the GIPA Act to exclude days within the Christmas shutdown period.

### **Recommendation 7**

Amend section 60(1)(a) of the GIPA Act to provide a list of non-exhaustive factors that decision makers may consider when deciding whether dealing with an application would involve an unreasonable and substantial diversion of an agency's resources. The factors can include:

- The public interest in releasing the information
- The estimated volume of information involved in the request
- The demonstrable importance of the information to the applicant
- Whether the request is reasonably manageable, bearing in mind the size and particular resourcing of the agency
- The timeframe within which the agency is bound to respond.

### **Recommendation 8**

Amend section 60(1) of the GIPA Act to insert a new subsection (1)(e) to the effect that an agency *may* refuse to deal with an access application where:

- There is evidence to show that the applicant, or someone with whom the applicant is acting in concert, is a party to current court proceedings, and
- The party to the proceedings would be able to apply for the information under the court's own procedures (for example, by a discovery order).

### **Recommendation 9**

Amend section 86 of the GIPA Act to provide that, in cases where more than one party has a right to seek internal review of a decision, the 15 working days within which an agency is required to complete an internal review may begin on the day all interested parties' applications are received, or upon the expiration of the 20 working days within which aggrieved persons are required to lodge their applications for internal review (whichever is earlier). However, agencies should retain discretion to commence the review period as soon as an application is received.



### **Recommendation 10**

Include a note to section 85 of the GIPA Act cross-referencing section 127.

### **Recommendation 11**

Amend Division 3 of Part 5 of the GIPA Act to provide that the Information Commissioner cannot review a decision that has already been subject to a review by the Information Commissioner.

### **Recommendation 12**

Amend the GIPA Act to provide that:

- The Information Commissioner has 40 working days from the day on which the Commissioner receives all necessary information relating to a review application to complete a review of a decision
- The review period can be extended with the consent of the parties
- If the review is not completed within the review timeframe, the original decision stands, and the only option available to the applicant is to seek a review by NCAT.

### **Recommendation 13**

Amend section 100 of the GIPA Act to include a provision akin to section 89(2) of the GIPA Act, to require a third party to seek internal review prior to seeking NCAT review.

### **Recommendation 14**

Amend section 110 of the GIPA Act to:

- Allow NCAT to make restraint orders covering others who may be 'acting in concert' with the primary applicant
- Allow NCAT to accept that an application is lacking in merit where it has previously found that application to be lacking in merit
- Give NCAT greater flexibility in determining the terms of restraint orders
- Direct NCAT as to the kinds of factors that should be considered where an applicant subject to a restraint order seeks permission from NCAT to make a further application.

#### **Recommendation 15**

Amend section 112 of the GIPA Act to:

- Clarify that applicants and other parties to an external review cannot bring proceedings under section 112
- Clarify that, at the completion of a matter, if NCAT considers it warranted, NCAT can refer the papers of that matter to the relevant Minister
- Provide that, in the event that the responsible Minister is already party to the main proceedings, NCAT can instead refer the matter to the Information Commissioner.

#### **Recommendation 16**

Amend clause 2(4) of Schedule 1 to the GIPA Act to clarify that information is not 'Cabinet information' to the extent that it is contained in a document that consists solely of factual material.

#### **Recommendation 17**

Amend clause 7 of Schedule 1 to the GIPA Act to provide that the clause also applies to relevant documents affecting law enforcement and public safety that are created by corresponding law enforcement agencies in other Australian jurisdictions.

#### **Recommendation 18**

Amend clause 2 of Schedule 2 to the GIPA Act to include 'review' as one of the 'excluded information' functions of the Privacy Commissioner.

#### **Recommendation 19**

Amend the GIPA Act and the GIIC Act to incorporate the technical amendments listed in Appendix A.

# 1. Introduction

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- 1.1 The GIPA Act and the GIIC Act were introduced in 2009 (commencing in 2010), following the NSW Ombudsman's report, *Opening up government – Review of the Freedom of Information Act 1989 (the NSW Ombudsman's report)*. Broadly speaking, the Ombudsman's report recommended that the *Freedom of Information Act 1989 (the FOI Act)* be repealed and replaced with a new Act to simplify and streamline processes to access government information. The Ombudsman's report also recommended that government agencies exercise a greater level of proactive disclosure of government information and that an independent Information Commissioner be appointed to provide effective oversight of public access to government information.<sup>1</sup>
- 1.2 The GIPA Act established a framework of principles for the proactive disclosure of government information, as well as a presumption in favour of disclosure in the public interest. The GIIC Act established oversight by an independent champion of open government in the form of the Information Commissioner.

## Conduct of Review

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- 1.3 This Review has been conducted pursuant to section 130 of the GIPA Act and section 48 of the GIIC Act.
- 1.4 These two sections provide that the Act's responsible Minister (the Attorney General) is to review each Act to determine whether its policy objectives remain valid and whether its terms remain appropriate for securing its objectives.
- 1.5 The Department of Justice conducted this Review on the Attorney General's behalf. More detail on how we conducted this Review is provided at Appendix B.

## The GIPA Act's policy objectives

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- 1.6 The GIPA Act's objectives are clearly stated within the GIPA Act itself. In order to 'maintain and advance a system of responsible and representative democratic government that is open, accountable, fair and effective', the object of the GIPA Act is to provide open government information to the public by:
- Authorising and encouraging agencies to release government information by agencies
  - Giving members of the public an enforceable right to access government information, and
  - Providing that access to government information is restricted only where there is an overriding public interest against disclosure.<sup>2</sup>

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1. NSW Ombudsman, 'Opening up Government – Review of the *Freedom of Information Act 1989*', February 2009, page 7.

2. *Government Information (Public Access) Act 2009*, section 5.

- 1.7 For the purposes of the GIPA Act, 'agency' means a Public Service agency, a Minister, a public authority, a public office, a local authority, a court, and a person or entity that is an agency pursuant to regulations under clause 5 of Schedule 4 to the GIPA Act.<sup>3</sup> The Information Commissioner refers to the various types of agencies in terms of four sectors: the local council sector; the university sector; the Ministerial sector; and the government sector (comprising all remaining entities).<sup>4</sup>
- 1.8 The GIPA Act contains four 'pathways' for agencies to release government information:
- Mandatory proactive release: agencies must make certain information, such as information about the structure and functions of the agency, policy documents, a disclosure log of access applications and a register of government contracts, publicly available free of charge<sup>5</sup>
  - Authorised proactive release: agencies may make any government information publicly available unless there is an overriding public interest against disclosure of the information<sup>6</sup>
  - Informal release: agencies may release government information in response to an informal request<sup>7</sup>
  - Access applications: agencies must provide access to information in response to an application, unless there is an overriding public interest against disclosure of the information.<sup>8</sup>
- 1.9 To reinforce the GIPA Act's objectives of promoting transparency and release of government information, it also includes several offence provisions with respect to conduct that impedes public access to government information.

## The GIIC Act's policy objectives

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- 1.10 Unlike the GIPA Act, the GIIC Act does not expressly specify its objective. The Explanatory Memorandum accompanying the introduction of the Government Information (Information Commissioner) Bill (**the GIIC Bill**) explained that its objective 'is to create the office of Information Commissioner, who is to have the functions conferred or imposed on the Commissioner by or under' the GIPA Act.
- 1.11 The NSW Ombudsman's report noted that the FOI Act was 'without a champion' and proposed that an Information Commissioner be appointed to provide

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3. *Government Information (Public Access) Act 2009*, section 4(1).

4. Information Commissioner, *Report on the Operation of the Government Information (Public Access) Act 2009 2014-2015*, Appendix 1-5, pages 64 to 93.

5. *Government Information (Public Access) Act 2009*, section 6.

6. *Government Information (Public Access) Act 2009*, section 7.

7. *Government Information (Public Access) Act 2009*, section 8.

8. *Government Information (Public Access) Act 2009*, section 9.

‘independent oversight and accountability for the new Act and be its guardian, the public proponent for the objects and intentions of the new system’.<sup>9</sup>

- 1.12 To perform this role with respect to the GIPA Act, the GIIC Act establishes the role of Information Commissioner. The Information Commissioner promotes open government and provides information, advice, assistance and training to agencies and the public,<sup>10</sup> and is empowered to:
- Review agencies’ decisions in relation to access applications<sup>11</sup>
  - Receive, investigate and resolve complaints about agencies in relation to their information disclosure obligations<sup>12</sup> (other than decisions that are reviewable under the GIPA Act)
  - Investigate and report to the Attorney General and principals of agencies on the exercise of any functions of one or more agencies in relation to their management of government information, including those agencies’ systems, policies and practices<sup>13</sup>
  - Report on compliance with the GIPA Act.<sup>14</sup>
- 1.13 To fulfil those functions, the Commissioner has a variety of powers, which include:
- Entry and inspection of premises
  - Applying for injunctive relief to prevent contraventions of the GIIC Act and GIPA Act
  - Bringing judicial review proceedings in connection with the exercise of an agency’s functions under the GIPA Act
  - Making or holding formal inquiries.
- 1.14 The GIIC Act also outlines a number of offences with respect to obstructing the functions of the Information Commissioner.
- 1.15 We found that GIIC Act’s policy objective remains valid, and its terms remain suitable to meet that objective. We do not recommend any substantive amendments to the GIIC Act.
- 1.16 We note that the Information Commissioner’s submissions to the Review made several proposals for technical amendments to the GIIC Act to promote efficacy and clarity. We consider that a number of these suggested technical amendments are appropriate and warranted, and have recommend that they be adopted. Many other agencies also suggested technical amendments, some of which we recommend be

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9. NSW Ombudsman, ‘Opening up Government – Review of the *Freedom of Information Act 1989*’, February 2009, page 97.

10. Hon Tony Kelly, Government Information (Public Access) Bill 2009, Second Reading Speech (13 July 2009) page 1.

11. *Government Information (Public Access) Act 2009*, part 5.

12. *Government Information (Information Commissioner) Act 2009*, section 17.

13. *Government Information (Information Commissioner) Act 2009*, section 21.

14. *Government Information (Information Commissioner) Act 2009*, section 24.

adopted. All the technical amendments we propose be made to the GIIC Act (and the GIPA Act) are included at Appendix A to the Review Report.

- 1.17 The Information Commissioner also suggested that the investigation, enforcement and reporting provisions of the GIIC Act could be enhanced (as well as the offence provisions in both the GIIC Act and the GIPA Act). The Information Commissioner's suggestions have been considered carefully, and the Review agrees that robust and effective investigation, enforcement and reporting measures are important to promote the GIPA and the GIIC Acts' objectives and encourage compliance and transparency.
- 1.18 The Review has not made recommendations to amend the investigation, enforcement and reporting (or offence) provisions of the GIIC Act (or GIPA Act) at this stage. These provisions have been used infrequently to date, however, examples where they have been used indicate that they are effective, and allow the Information Commissioner to satisfy prescribed statutory functions. For example, several reports of investigations undertaken by the Information Commissioner since the GIPA and the GIIC Acts commenced indicate that agencies have been forthcoming and cooperative during investigations.<sup>15</sup>
- 1.19 While the Review has not made any recommendations for amendment, we are conscious that stakeholders and the Information Commissioner have a keen interest in ensuring the investigation, enforcement and reporting provisions of the GIIC Act, as well as those of the GIPA Act, remain fit for purpose. The Department will convene a senior officials-level working group, which will include representatives from the Integrity Agencies Working Group, to:
- Consider cases in which these provisions have been used
  - Evaluate the suitability of the provisions for application in those cases and in future cases that may arise, and
  - Make any recommendations for amendment that the group deems necessary, for consideration by the Attorney General.

## Operation of the GIPA Act and the GIIC Act

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- 1.20 The GIPA Act and GIIC Act both operate to promote public access to government information and greater transparency in administration, governmental decision making and expenditure of public funds. They represent an important element of the NSW Government's commitment to promoting open government and the principles of transparency, collaboration, participation and innovation<sup>16</sup> (recently reaffirmed in

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15. See for example: Information and Privacy Commission, 'Own motion investigation report – WorkCover Authority of NSW' (2013); Information and Privacy Commission, 'Own motion investigation report – Manly Council' (2013); Office of the Information Commissioner, 'Barangaroo Delivery Authority meetings its open access obligations under the GIPA Act 2009'. These and other investigation reports can be accessed at <http://www.ipc.nsw.gov.au/gipa-investigations>.

16. NSW Department of Finance, 'Priorities: Open Government', the strategy can be accessed at <https://www.finance.nsw.gov.au/ict/priorities/open-government>.

the NSW Government ICT Strategy, *Digital+ 2016*).<sup>17</sup> Some other key open government initiatives in NSW include:

- Implementation of the *Data Sharing (Government Services) Act 2015*
- Establishment of the Data Analytics Centre to facilitate data sharing between agencies and inform more efficient, strategic, whole-of-government evidence-based decision making<sup>18</sup>
- Adoption of a government-wide Information Management Framework to ensure data and information can be appropriately shared or re-used by agencies, individual public sector staff, the community or industry for better services, improved performance management and a more productive public sector<sup>19</sup>
- Release of the second Open Data Policy 2016, backed by an Action Plan that includes initiatives that: recognise that open data is a driving force for the NSW digital economy; and provide a platform for innovation and evidence-based policy to improve government services<sup>20</sup>
- Appointment of the Information Commissioner as the Open Data Advocate.

1.21 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.

1.22 In the past seven years, 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.

1.23 Generally, government agencies have high compliance rates with mandatory proactive release and authorised proactive release of government information.<sup>21</sup> There are some concerns with universities' compliance with contract reporting obligations, and local councils have reported significant compliance burdens flowing from their additional mandatory proactive release obligations. The Information Commissioner has been working with these sectors to address these concerns.

1.24 Since the introduction of the GIPA Act, well over 12,000 valid formal access applications have been processed by NSW Government agencies each year,

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17. NSW Department of Finance, 'Digital+ 2016: NSW Government ICT Strategy Final Update' (2015), the report can be accessed at [https://www.finance.nsw.gov.au/ict/sites/default/files/resources/Digital\\_Strategy\\_2016\\_20151125.pdf](https://www.finance.nsw.gov.au/ict/sites/default/files/resources/Digital_Strategy_2016_20151125.pdf).

18. NSW Department of Finance, Services and Innovation, 'NSW Data Analytics Centre', the page can be accessed at <https://www.finance.nsw.gov.au/nsw-data-analytics-centre>

19. NSW Department of Finance, 'A Common Approach to Information Management and Standards' (July 2013), the report can be accessed at <https://www.finance.nsw.gov.au/ict/sites/default/files/IM%20common%20approach%20v1.pdf>

20. Data NSW, 'Open data blog', the page can be accessed at <https://data.nsw.gov.au/>

21. Data from the reports produced by the Information Commissioner under section 37 of the *Government Information (Information Commissioner) Act 2009*.

peaking at 17,796 in the 2010-11 financial year.<sup>22</sup> In 2015-16, there were 14,761 valid access applications, representing a 14 per cent increase on 2014-15 numbers.<sup>23</sup>

- 1.25 Since the GIPA Act's introduction, the government sector has accounted for the vast majority of valid access applications, with the NSW Police Force and NSW Roads and Maritime Services consistently receiving the greatest number of applications.<sup>24</sup> In the 2015-16 financial year, 85 per cent of applications were made to government sector bodies, with only 2,009 and 111 applications made to local councils and universities respectively.<sup>25</sup>
- 1.26 Most access applications made under the GIPA Act continue to come from members of the public and relate to personal information (totalling 52 per cent of applications in 2015-16). In 2015-16, 93 per cent of applications were decided within the timeframes prescribed by the GIPA Act, with most applicants (68 per cent) receiving access to requested information either in full or in part.<sup>26</sup> Most decisions that were subject to review (discussed below at 7.10) during this period were upheld.<sup>27</sup>

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22. Information Commissioner, *Report on the Operation of the Government Information (Public Access) Act 2009 2014-2015*, page 28.

23. Information Commissioner, *Report on the Operation of the Government Information (Public Access) Act 2009 2015-2016*, page 32

24. Information Commissioner, *Report on the Operation of the Government Information (Public Access) Act 2009 2015-2016*, page 30.

25. Information Commissioner, *Report on the Operation of the Government Information (Public Access) Act 2009 2015-2016*, page 33.

26. Information Commissioner, *Report on the Operation of the Government Information (Public Access) Act 2009 2015-2016*, page 30-31.

27. Information Commissioner, *Report on the Operation of the Government Information (Public Access) Act 2009 2014-2015*, page 28.



## 2. Interaction between the GIPA Act and the PPIP Act

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- 2.1 Section 130(1A) of the GIPA Act requires the responsible Minister to consider the relationship between the GIPA Act and the *Privacy and Personal Information Protection Act 1998* (the **PPIP Act**) as part of this Review.
- 2.2 The GIPA Act and the PPIP Act both concern the management and handling of information held by government. The GIPA Act and PPIP Act have substantially different objectives, however. The GIPA Act aims to promote the disclosure of government information to maintain and advance a system of responsible and representative democratic government that is open, accountable, fair and effective. The PPIP Act seeks to protect privacy through 12 Information Protection Principles (IPPs), which regulate the collection, use and disclosure of personal information by public sector agencies.
- 2.3 There are some inherent overlaps and contradictions between the right to access government information and the protection of privacy. In general, freedom of information legislation promotes access by members of the public to information created and held by public sector agencies ('government information', which may include personal information), while privacy legislation operates to protect the personal information of individuals by obliging agencies that hold such information to manage it responsibly.
- 2.4 The GIPA Act and the PPIP Act have overlapping obligations relating to the management of certain government-held information. Each Act provides its own definition of 'personal information', and creates distinct pathways for individuals to access personal information. There have been suggestions from some stakeholders that these definitions and pathways should be aligned.
- 2.5 Under the PPIP Act, individuals can seek access to, and amendment of, their own personal information as held by public sector agencies. Under the GIPA Act, an applicant can apply to agencies for access to government information those agencies hold, which may include both an applicant's own personal information and/or the personal information of third parties.
- 2.6 Since its adoption, the GIPA Act has increasingly been used by individuals to seek access to their personal information. Since 2010, applications for access to personal information have been the most common type of access applications made under the GIPA Act, rising from 22 per cent in 2010-11 to a peak of 55 per cent in 2014-15 (decreasingly slightly to 52 per cent in 2015-16).
- 2.7 It is likely that the increasing reliance on the GIPA Act to seek access to personal information has been influenced by several factors. These include, in particular, that the GIPA Act provides a more prescriptive and comprehensive application process than the PPIP Act, with clear requirements about decision making processes, timeframes for decisions, and consultation with interested parties. Submissions to this Review and targeted consultation also indicated that both agencies and applicants have less understanding of and familiarity with the PPIP Act and its processes for seeking access to personal information, and that some agencies may be encouraging applicants to apply for personal information under the GIPA Act.
- 2.8 A number of recent reviews have noted that having two concurrent schemes to access personal information held by government has potential to create inconsistency, confusion and duplication for individuals and agencies. Some of those reviews have offered options for consolidating the schemes, or more clearly differentiating their particular scope and responsibilities.

- 2.9 For instance, the NSW Law Reform Commission's 2010 report, *Access to personal information*, recommended that the GIPA Act be amended to provide that it does not cover access applications that are solely for the personal information of the applicant.<sup>28</sup> The main rationale for this was that the rights to access and to amend one's own personal information are fundamental privacy rights, which should be dealt with under privacy legislation.
- 2.10 An alternative is that the GIPA Act becomes the sole pathway for accessing personal information, and that the additional rights with respect to the protection of personal information provided for in the PPIP Act be incorporated into the GIPA Act. These include the PPIP Act's provisions that allow individuals to both access and amend their personal information, and that specify that applications for access to personal information only are to be free of charge. The Privacy Commissioner has expressed concerns about this alternative, arguing that rights relating to privacy should be contained within a dedicated piece of legislation.<sup>29</sup>
- 2.11 Considerations of how the GIPA Act and the PPIP Act do and should intersect are affected by the broader NSW and national information management framework, and the operation of a number of other legislative instruments and policies. To effectively examine how the GIPA Act and the PPIP Act interact, it is important to also consider factors including:
- The broader legislative environment, including the GIPA Act's and the PPIP Act's interactions with the GIC Act, *State Records Act 1998*, *Public Interest Disclosure Act 2013* and the *Data Sharing (Government Sector) Act 2015*
  - Evolving community expectations about access to government information on the one hand, and protection of individuals' personal information and privacy on the other
  - Developing ideas about how government might improve policy development and service delivery in light of new technologies and data sharing
  - New opportunities offered by open data and the adoption of the NSW Open Data Action Plan 2016.
- 2.12 The Information Commissioner has submitted that the GIPA Act should keep abreast of developments in international and domestic open government policies, increase emphasis on government data as a subset of government information, and facilitate better information sharing and use of information in digital environments across agencies. The Commissioner has suggested that the GIPA Act could provide a framework through which agencies can share government information (a 'fifth pathway' for access to government information).
- 2.13 These are significant and complex issues. In undertaking this Review, and from the work of the Department more broadly, it is clear that further work is needed to consider and address how the GIPA Act and other intersecting pieces of legislation work together to promote the potentially competing interests of open government

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28. NSW Law Reform Commission, Report 126, *Access to personal information* (2010), Recommendation 14.

29. Privacy Commissioner, Submission to the Statutory Review of the *Government Information (Public Access) Act 2009*, 15 September 2014.

and privacy protection. Some of the issues relevant to such a consideration could include:

- Community expectations about how government accesses and manages information (including personal information)
- Community expectations about how government delivers services and programs ('one government', 'single customer')
- Relevant developments in freedom of information and privacy regimes in other jurisdictions nationally and internationally
- How technological developments affect the management of government information (including personal information) and the delivery of government services.

### 3. Accessing Government Information – General Principles

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- 3.1 Section 5 of the GIPA Act provides that there is a ‘presumption’ in favour of the disclosure of government information unless there is an overriding public interest against that disclosure.<sup>30</sup>

#### Public interest considerations

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- 3.2 Sections 12 to 14 of the GIPA Act outline the public interest considerations in favour of the disclosure of government information, and the competing public interest considerations against the disclosure of government information.
- 3.3 Section 12 provides that there is a general public interest in favour of the disclosure of government information. It provides that nothing in the GIPA Act limits any other public interest considerations in favour of disclosure that may be taken into account. A legislative note to the section provides five non-exhaustive examples of the types of public interest considerations in favour of disclosure.
- 3.4 Section 13 provides that there is an overriding public interest against disclosure *only if* there are public interest considerations against disclosure that outweigh the public interest considerations in favour of disclosure (a balancing test). This supports the presumption in favour of disclosure.
- 3.5 Section 14 sets out the only public interest considerations against disclosure that may be considered in the section 13 balancing test. Section 14(1) provides that it is to be ‘conclusively presumed’ that there is an overriding public interest against the disclosure of any of the government information described in Schedule 1 to the GIPA Act (with the effect that any information in Schedule 1 is not to be disclosed in any circumstance). Section 14(2) provides that the public interest considerations listed in the Table to section 14 are the only other public interest considerations that may be taken into account as factors weighing against disclosure.<sup>31</sup>
- 3.6 A number of submissions suggested that the listed examples of the types of public interest considerations in favour of disclosure of government information included in the legislative note to section 12 should be expanded. We considered that the current list offers useful and sufficient guidance to decision makers when conducting the balancing test, and that there is no compelling reason to expand that list. A longer list may also be incorrectly read as being exhaustive, discouraging decision makers from considering all public interest considerations in favour of disclosure, contrary to section 12’s intent. We also note that section 12 allows the Information Commissioner to issue guidelines about public interest considerations in favour of disclosure to assist agencies as required. We consider that the current sections, complemented by any guidelines issued by the Information Commissioner, as she considers necessary, are adequate.
- 3.7 Several submissions suggested that the exhaustive list of public interest considerations against disclosure under section 14(1) and the information for which

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30. *Government Information (Public Access) Act 2009*, section 5.

31. *Government Information (Public Access) Act 2009*, section 14(1).

there is a conclusive presumption of overriding public interest against disclosure in Schedule 1 should be expanded. Two of these proposals warrant particular mention.

- 3.8 Firstly, a number of submissions proposed that there should be a public interest consideration against disclosure of government information that is relevant to court proceedings to which the applicant is a party. The concern expressed in these submissions was that allowing litigants to use the GIPA Act to access information in these circumstances would circumvent the inherent jurisdiction of courts to control their own processes.<sup>32</sup>
- 3.9 We agree that further limiting the use of the GIPA Act during court proceedings is warranted, however, we do not consider that amending section 14 to include an additional public interest consideration against disclosure is necessary. We have instead recommended amendment to section 60(1)(d) of the GIPA Act (discussed at 5.42 below), which we consider will address this concern.
- 3.10 Secondly, agencies involved in law enforcement in NSW proposed further restrictions on the disclosure of documents affecting law enforcement and public safety, particularly in regard to intelligence information received from other jurisdictions. While the likelihood of such information being released is low due to the considerations listed in section 14, we agree that the risks presented by the possibility of such information being released warrants an amendment to clause 7 of Schedule 1 (discussed further in Chapter 9 - below).

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32. Crown Solicitor's Office, Review of the GIPA Act, 19 September 2014.

## 4. Open Access Information

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- 4.1 Part 3 of the GIPA Act outlines what constitutes ‘open access information’, and what agencies’ obligations are in relation to the mandatory proactive release of that information. Information that is deemed open access includes agencies’ policy documents, disclosure logs of access applications, and government contracts registers. As the Information Commissioner noted in the section 37 Report on the Operation of the GIPA Act 2014-2015, proactive disclosure ‘underpins the provision of responsive and effective government services through maximising the availability of government held information.’<sup>33</sup> The Information Commissioner’s report found a high rate of compliance by government agencies with their mandatory proactive release of information (83 per cent).
- 4.2 We found that the GIPA Act’s provisions relating to open access information are generally operating well and achieving the objects of the GIPA Act. However, we also found that some sectors, in particular local councils, are still experiencing difficulties in complying with their open access information obligations. We have therefore proposed a number of amendments to the GIPA Act to assist with alleviating the compliance burden that local councils face under the existing legislative arrangements.

### Open access information and local authorities

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- 4.3 Section 18 of the GIPA Act defines ‘open access’ information to include ‘such...government information as may be prescribed by the regulations’. Schedule 1 of the Government Information (Public Access) Regulation 2009 (**the GIPA Regulation**) prescribes ‘additional open access information’ held by local authorities (including local councils), including different types of plans and policies, as well as information about approvals, orders, and development applications (**DAs**).
- 4.4 Under clause 3 of Schedule 1 of the GIPA Regulation, DAs within the meaning of the *Environmental Planning and Assessment Act 1979* (NSW) (**the EP&A Act**), any associated documents received about a proposed development, and any decisions made about DAs are all prescribed as open access information.
- 4.5 In addition to their GIPA Act requirements, local councils also have requirements under the EP&A Act to publish DAs. The Department of Planning and Environment is currently developing an ePlanning program, which includes a central portal to provide online lodgement, tracking and publication of planning applications and determinations. This work is still in progress, and it is unclear as yet how that program may overlap with the local councils’ obligations under the GIPA Act.

### Development applications

- 4.6 Under sections 6(2) and 6(3) of the GIPA Act, and clause 3 of Schedule 1 to the GIPA Regulation, local councils are required to make all DAs and related documents publicly available free of charge on their websites (unless this would

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33. Information Commissioner, Report on the Operation of the Government Information (Public Access) Act 2009 (2014-2015) page 6.

impose unreasonable costs) and can be made available in another way, such as by inspection. At least one of the ways in which open access information is to be made available must be free of charge.

- 4.7 Submissions from 28 local councils indicated that the existing requirements for local councils to publish all DAs and related documents on their websites free of charge (and/or make them available in another way free of charge), are too burdensome. Local councils submitted that they do not have adequate resources to digitise all their older DAs (often vast in number, and sometimes many decades old), or to make them all available in another form free of charge.
- 4.8 We recommend striking a better balance in the GIPA Act between facilitating public access to local council information that is of strong public interest, and avoiding excessive resource and regulatory burden on local councils responsible for making that information accessible in the currently prescribed manner. To improve compliance and reduce unnecessary regulatory burden on local councils, we propose introducing a time limit for the proactive disclosure of information relating to DAs.
- 4.9 We suggest that all DAs (and associated documents) that were lodged before the commencement of the GIPA Act be excluded from the definition of 'open access information' for the following reasons:
- Local councils did not have obligations to proactively publish or make DAs and associated documents freely available under the FOI Act (although we note that local councils were required to make DAs available for physical inspection in local council offices under the *Local Government Act 1993*). The obligations introduced by the GIPA Act have had a significant retrospective effect for pre-2010 DAs.
  - The evidence submitted to this Review suggests that the additional costs (both in terms of time and resources) involved in making all DAs open access is unreasonable in many cases, and there has been unanticipated administrative burden, which arguably outweighs the interest in making all older DAs open access.
  - There are stronger public interest considerations in favour of the mandatory proactive disclosure of current and recent DAs. It is important that members of the public be able to access these DAs quickly and easily without cost, to determine how they may be affected and be in a position to raise any concerns. However, that importance is arguably less in the case of pre-2010 DAs, the relevant developments for which will already be well underway or long completed, making the urgency of access to those DAs subsequently less.
  - DAs lodged prior to 2010 will remain accessible under the GIPA Act via both formal and informal access requests.

### **Recommendation 1**

Amend clause 3 of Schedule 1 to the GIPA Regulation to exclude development applications (and associated documents) lodged before the commencement of the GIPA Act from the definition of 'open access information'.

## Copyright and development applications

- 4.10 Section 6(6) of the GIPA Act provides that nothing in section 6 ‘requires or permits’ an agency to make open access information available in any way that would constitute an infringement of copyright. Nevertheless, a significant number of local councils submitted that they are still concerned about copyright infringement when complying with open access information requirements. DAs often contain intellectual property subject to copyright, for example, architectural plans and survey reports. In order to comply with the open access requirements, while ensuring they do not contravene the *Copyright Act 1968* (Cth) (**the Copyright Act**), local councils submitted that they must thoroughly assess every DA to determine what content might be subject to copyright. Significant resources may then be required to locate relevant copyright owners and consult with them as to publication. If copyright permission is not provided, local councils must provide ‘view only’ access by inspection to the relevant material. Where a local council provides copying equipment at inspection sites, it could risk liability for authorising infringement of copyright if a user made copies but did not meet the requirements of the fair dealing exceptions in the Copyright Act.
- 4.11 These concerns have been raised and examined in a number of earlier reviews and inquiries. Similar copyright concerns have also been raised with respect to local councils’ obligations under the EP&A Act. The Information and Privacy Commission (**IPC**) is also working with local councils to help them increase their compliance with the GIPA Act.
- 4.12 A number of local councils submitted that, to address their concerns, the Copyright Act should be amended to specify that local councils are exempt from copyright requirements where they are have a competing obligation to disclose information under the GIPA Act. The Australian Law Reform Commission Report 122, *Copyright and the Digital Economy* (**ALRC Report 122**), of November 2013, made a similar recommendation to amend the Copyright Act (Recommendation 15-4).<sup>34</sup>
- 4.13 In its submission to the ALRC Discussion Paper for ALRC Report 122, the NSW Government supported such exceptions in the Copyright Act for use in the public interest and noted that the requirements of the Copyright Act ‘interfere significantly with the ability of Councils to perform what would otherwise by statutory obligations, imposed to promote openness and accountability of decisions affecting the public.’<sup>35</sup> The Commonwealth Government is yet to respond to ALRC Report 122.
- 4.14 We support consideration of an exception in the Copyright Act for local councils where they are under statutory public disclosure obligations. The Department will consider approaching the Commonwealth Government to explore this proposal. We recognise that this would need to be considered against the wider context of any Commonwealth Government copyright reforms, including any responses to ALRC Report 122 and the September 2016 Productivity Commission Inquiry Report into Intellectual Property Arrangements in Australia. Consideration would also be required as to the impacts of ongoing reforms in NSW to local government and planning processes, and any NSW Government response to the recent Independent Pricing and Regulatory Tribunal (**IPART**) *Review of reporting and compliance*

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34. The Australian Law Reform Commission, *Copyright and the Digital Economy*, November 2013 Report 122.

35. NSW Submission, ALRC Issues Paper, page 11.



*burdens on Local Government 2016*. The IPART Review draft report of January 2016 also addressed the issue of local councils' compliance burdens and uncertainties under the GIPA Act and discussed the copyright concerns local councils have with respect to their obligations under both the GIPA Act and the EP&A Act.<sup>36</sup>

## Disclosure logs

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- 4.15 Under section 25 of the GIPA Act, agencies are required to keep a disclosure log that documents the information they have released in response to access applications, which may be of interest to other members of the public. Disclosure logs are designed to make information provided in response to access applications available more broadly.
- 4.16 Agencies do not need to publish all the information they have released in response to an access application in their disclosure logs.<sup>37</sup> Applicants and third parties may object to the inclusion of information on the disclosure log,<sup>38</sup> and, under section 80(m) of the GIPA Act, can seek review of agency's decisions to include specific information in their disclosure log despite an objection.<sup>39</sup>
- 4.17 The Information Commissioner has observed that agencies and third party objectors are often unsure about how a third party is to seek review of a decision to include information in a disclosure log. In particular, the Information Commissioner submitted that it is unclear:
- What test an external review body should apply when reviewing a decision to include information in a disclosure log
  - Whether a third party objector is only required to make out a single ground on which to object to inclusion of information in a disclosure log, or whether a balancing test is required
  - Which party bears the onus of establishing whether or not the information should be included in a disclosure log.
- 4.18 Further clarification of the rights to make, and the processes for determining, objections to the inclusion of information in agencies' disclosure logs is needed. We recommend that the GIPA Act be amended to specify that, when a decision under section 80(m) is subject to internal or external review, the reviewer should consider whether the public interest in making the information available to other members of the public in the disclosure log outweighs the authorised objector's reasons for objecting.
- 4.19 The GIPA Act should also be amended to clarify that, on review, the authorised objector bears the onus of establishing that the information should not be included in the disclosure log. This is consistent with the general approach of section 97,

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36. The IPART Draft Report 2016 is accessible at: [http://www.ipart.nsw.gov.au/files/sharedassets/website/shared\\_files/investigation\\_-\\_section\\_9\\_-\\_legislative\\_requirements\\_-\\_local\\_government\\_regulatory\\_burdens/draft\\_report\\_-\\_review\\_of\\_reporting\\_and\\_compliance\\_burdens\\_on\\_local\\_government\\_-\\_january\\_2016.pdf](http://www.ipart.nsw.gov.au/files/sharedassets/website/shared_files/investigation_-_section_9_-_legislative_requirements_-_local_government_regulatory_burdens/draft_report_-_review_of_reporting_and_compliance_burdens_on_local_government_-_january_2016.pdf) (p.126).

37. *Government Information (Public Access) Act 2009*, section 25.

38. *Government Information (Public Access) Act 2009*, section 56(1).

39. *Government Information (Public Access) Act 2009*, section 80(m).

which places the onus on the party seeking to prevent information being made publicly available and on the public interest in releasing government information.

### **Recommendation 2**

Amend the GIPA Act to clarify that, in a section 80(m) review, the onus is on the authorised objector to prove that the reasons for the objection outweigh the public interest in including the information in the disclosure log.

## **Government contracts register**

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- 4.20 Under Part 3 of the GIPA Act, agencies are required to publish a register of government contracts as open access information. Division 5 of Part 3 provides for three different classes of government contracts and sets out the disclosure requirements for each class.
- 4.21 A Class 1 contract is a contract to which the agency is a party that has, or is likely to have, a value of \$150,000 or more. A Class 2 contract is a Class 1 contract that also has satisfied a number of additional criteria, and a Class 3 contract is a Class 2 contract with a value of \$5 million or more. The disclosure requirements for Class 1 and Class 2 contracts are set out in sections 29 and 30 of the GIPA Act, while section 31 provides that a copy of a Class 3 contract must be made available on the government contracts register.<sup>40</sup> Certain confidential information is not required to be published on the government contracts register.<sup>41</sup>
- 4.22 Details of a government contract must be entered by the agency on the government contracts register within 45 days of the contract becoming effective, and entries on the register must be updated within 45 days of a material variation to the contract.<sup>42</sup> Information about a contract must remain on the register for at least 20 working days or for the duration of the contract, whichever is longer.<sup>43</sup>
- 4.23 There are exceptions to the requirement to publish certain types of contracts on the register that apply to the Department of State and Regional Development (now the Department of Industry), State owned corporations and Landcom.<sup>44</sup>
- 4.24 The government contract disclosure requirements under the GIPA Act have an important role in ensuring that the expenditure of public funds is transparent and subject to public scrutiny. We consider that the overall policy objectives of Division 5 of Part 3 remain valid and that the provisions of the GIPA Act are well suited to achieving those objectives.

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40. *Government Information (Public Access) Act 2009*, section 31.

41. *Government Information (Public Access) Act 2009*, section 32.

42. *Government Information (Public Access) Act 2009*, sections 27(2) and 33(2).

43. *Government Information (Public Access) Act 2009*, section 34(2).

44. *Government Information (Public Access) Act 2009*, sections 38-40.

## Threshold for disclosure

- 4.25 The legislative requirement to disclose government contracts with a value of over \$150,000 has been in place since 1 January 2007, when section 15A of the old FOI Act commenced.
- 4.26 Over the course of this review, a number of agencies submitted that the \$150,000 threshold for disclosable contracts is now too low, and creates an unreasonable administrative burden for agencies. While the threshold may have been appropriate ten years ago, several agencies submitted that the number of contracts that must now be reported on the contracts register is significant, involving considerable administrative effort.
- 4.27 We recognise this reporting all contracts valued at over \$150,000 may create an administrative burden, however, promoting transparency in public expenditure is one of the GIPA Act's key objectives, and there is a strong public interest in making information about the expenditure of public funds available. As such, we consider that the \$150,000 (including GST; see below) threshold for including contracts on the government contracts register remains appropriate and consistent with the objects of the Act.

## Types, value and variation of contracts for disclosure

- 4.28 Division 5 of Part 3 requires agencies to disclose 'each government contract to which the agency is a party'. Several submissions from agencies queried the scope of this requirement, in particular, whether funding agreements and 'panel arrangements' constitute 'government contracts', and whether contracts that involve the agency providing, rather than receiving, services in exchange for payment must also be disclosed.<sup>45</sup>
- 4.29 Agencies also expressed uncertainty about how the value of a government contract is to be calculated. For example, agencies were unsure whether GST should be included in the value of a contract and how the value of an ongoing contract should be calculated. We agree that the wording of section 27, with respect to the value of disclosable contracts, could be phrased more clearly, and have recommended in Appendix A (technical amendments) that it be amended to clarify that a contract's value is to be inclusive of GST for this purpose.
- 4.30 Three submissions suggested that the meaning of a 'material variation' to the contract, as referred to in section 33 but which is not defined in the GIPA Act, is unclear, and that agencies may be interpreting their obligation to update their government contracts registers inconsistently.
- 4.31 Given the breadth of contractual arrangements that agencies may enter into, it is appropriate that Division 5 of Part 3 is drafted in broad terms. We do not consider a legislative amendment to define what a 'material variation' to a contract is for the purposes of Division 5 Part 3 is necessary. Given the variety and complexity of government contracts, it would be undesirable for section 33 to be overly prescriptive.
- 4.32 Where agencies are uncertain about their obligations to disclose information on the government contracts register, or what constitutes a material variation, it may be more appropriate for the Information Commissioner to provide guidance.

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45. See for example, Transport for NSW, *Supplementary Submission to the Statutory Review of the Government Information (Public Access) Act 2009*, page 3.

## Application of the contracts register provisions to universities

- 4.33 NSW universities are defined as agencies under section 4(1) of the GIPA Act, and are required, like all other agencies, to maintain a government contracts register in accordance with Division 5 of Part 3. Universities have raised concerns about the application of these provisions with former Attorneys General, Ministers for Education and the Information Commissioner since 2010, as well as in submissions to the Review. In particular, the NSW Vice-Chancellors' Committee and the University of Western Sydney submitted that:
- The government contracts register provisions impose a burden on universities that is disproportionate to the public interest in the information that is disclosed
  - Universities are already required to maintain a 'Commercial Activities Register', so the obligation to also maintain a government contracts register results in unnecessary duplication
  - The requirement to maintain a government contracts register places NSW universities at a competitive disadvantage
  - The section 32 exemption for confidential information not required to be included in the register is insufficient to protect universities' commercial-in-confidence information.
- 4.34 The NSW Vice-Chancellors' Committee and the University of Western Sydney proposed an amendment to the GIPA Act to create an exception to Division 5 of Part 3 for universities in similar terms to section 39, which provides an exception for State owned corporations from compliance with the contract register provisions.
- 4.35 We acknowledge the concern of several universities that the requirement to maintain a government contracts register may place them at a competitive disadvantage compared with institutions in other jurisdictions and the private sector. However, the GIPA Act already contains provisions designed to protect commercial-in-confidence information.<sup>46</sup> Creating a more general exemption from Division 5 of Part 3 of the GIPA Act for universities would be contrary to the objective of encouraging the proactive public release of government information.
- 4.36 A significant amount of NSW universities' funding comes from public sources (approximately 40 per cent from the Commonwealth Government and 3 per cent from the NSW Government),<sup>47</sup> and there is a strong public interest in ensuring public oversight and transparency in universities' contracting practices. Over the past 10 years, the Independent Commission Against Corruption has publicly reported seven separate instances where persons have corruptly obtained benefits from the allocation of university contracts.<sup>48</sup>
- 4.37 The Information Commissioner has highlighted that there is evidence that increased transparency with respect to public sector agency contracts with the private sector can lead to improved performance of outsourced services as well as increased

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46. *Government Information (Public Access) Act 2009*, section 32.

47. NSW Vice-Chancellor's Committee, *Submission to the Statutory Review of the Government Information (Public Access) Act 2009*, page 2.

48. Information Commissioner, *Universities Compliance with the GIPA Act: Audit Report 2015*, page 1.

efficiency and value for money.<sup>49</sup> For universities, the Information Commissioner considers that more transparent contracting practices ensure:

- Contracts are awarded fairly
- Corporate malfeasance, fraud and corruption is minimised
- Public expenditure is appropriate
- The government is getting value for money
- Universities' resources are being used efficiently and effectively.<sup>50</sup>

4.38 The Information Commissioner is currently working with NSW universities to improve their compliance with the government contracts register provisions of the GIPA Act.<sup>51</sup> We anticipate that this work will assist in addressing some of the concerns universities have expressed. For example, by helping universities to develop better approaches towards compliance, the Information Commissioner's work may reduce the administrative burden universities face in publishing information on their government contracts registers. While this work is still ongoing, the IPC has already seen tangible improvements in universities' compliance. Universities have also been actively engaged with, and supportive of continuing, work with the IPC to improve their compliance.

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49. Information Commissioner, *Universities Compliance with the GIPA Act: Audit Report 2015*, page 2.

50. Information Commissioner, *Universities Compliance with the GIPA Act: Audit Report 2015*, page 1.

51. Information Commissioner, *Universities Compliance with the GIPA Act: Audit Report 2015*, page 9.

## 5. Access applications

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### Lodgement of access applications

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- 5.1 Multiple submissions proposed that the GIPA Act should clearly state that access applications can be lodged electronically via a government agency's website.<sup>52</sup>
- 5.2 At present, section 41(1) of the GIPA Act provides that applications 'must be in writing sent to or lodged at an office of the agency concerned'. Section 41(2) states that an agency 'may, with the approval of the Information Commissioner, approve additional facilities for the making of an access application'. Section 41(2) has the effect that agencies have a discretion to approve electronic lodgement of access applications, subject to the approval of the Information Commissioner.
- 5.3 The use of electronic communication is steadily increasing, and is the preferred method of communication with government for many Australians. Further, the NSW Government has made a commitment to exploring and utilising opportunities for 'digital government'. The Review considers that an express provision in the GIPA Act allowing agencies to accept access applications lodged electronically, without having to first seek the approval of the Information Commissioner for the relevant 'facility' for lodgement, would be beneficial. Offering more avenues for members of the public to seek access to government information is likely to encourage more people to seek information of interest to them, and to the public more widely, thereby promoting the objectives of the GIPA Act. It would also modernise the GIPA Act and reflect the increasing use of digital technologies for service delivery and communication between citizens and government.
- 5.4 We consider that section 41 of the GIPA Act should be amended to allow agencies the discretion to accept applications lodged electronically (in a form the agency considers appropriate), without having to seek prior approval from the Information Commissioner. In addition, we propose that section 41(1)(d) be amended to: provide that an applicant making an electronically lodged application must provide his or her name; and allow applicants to state either a postal address *or* an electronic address for correspondence. This will mitigate the risk of individuals using multiple email addresses to apply for the same information on multiple occasions (in relation to section 60(1)(b)), and to allow applicants to be contacted via their preferred method of correspondence. The Review notes that allowing applicants to provide an email address for correspondence would not have the effect of requiring information to be provided in electronic form to that address. Section 72, concerning forms of access, will continue to apply.
- 5.5 We appreciate that some agencies have concerns that allowing electronic lodgement may result in a substantial increase in the number of applications being made, the processing of which may result in adverse effects on agency resources. While we acknowledge this concern, we consider that an amendment to section 41 to allow, but not compel, agencies to accept electronically lodged access applications will mitigate against this. We also note that the object of the GIPA Act is to encourage open government information; greater numbers of access applications from members of the public would, in fact, further that object.

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52. For example, see submissions from Information Commissioner, NSW Planning and Environment, Mr Peter Timmins, Treasury and Finance, Tanya O'Dea, Media Organisations.

### Recommendation 3

Amend section 41 of the GIPA Act so:

- Agencies have the discretion to accept access applications lodged electronically without having to seek prior approval from the Information Commissioner
- Access applications can be made with either a postal address or and electronic address for correspondence
- Access applications must include the applicant's name.

## Partial transfer of applications

- 5.6 The GIPA Act provides that an agency that has received an access application ('recipient agency') may transfer an access application to another agency ('second agency') in certain circumstances (most relevantly, where a second agency holds the information, or the information relates more closely to the second agency's functions).<sup>53</sup> However, it does not expressly permit a recipient agency to transfer *part* of an application, where both the recipient agency and a second agency (or multiple second agencies) holds pieces of the information requested. Partial transfer would allow the various aspects of the application to be dealt with by multiple relevant agencies.
- 5.7 Under current arrangements, if a recipient agency holds any of the information requested, it must process the application with respect to the information it holds, and inform the applicant that other agencies hold some or all of the outstanding information as requested. This has the effect that the applicant will receive only some of the information requested, and will have to make additional applications to the other agencies (and pay additional application fees) to access the remaining information.
- 5.8 Four submissions to the Review proposed that the GIPA Act be amended to allow recipient agencies to transfer parts of access applications to other agencies. This proposal is supported by the Information Commissioner.
- 5.9 We consider that transfers and partial transfers of access applications promote access to information and minimise obstructions for applicants. We recommend that the GIPA Act be amended to grant recipient agencies a discretion to transfer *part* of an application in circumstances where the recipient agency determines that this is the most appropriate course of action. Factors that may influence whether a recipient agency determines that a partial transfer is warranted might include if it appears to the recipient agency that an applicant is seeking to avoid paying multiple fees for multiple applications by making a generalised application, or the original application is for information that could not reasonably be expected to be held by the recipient agency. We recommend that agencies that receive partial transfers be prohibited from imposing application fees (noting a fee will have been paid with the original application), but be permitted to impose processing charges with respect to processing any aspects of the application relating to information they hold. In accordance with sections 48 and 57, the agencies that receive partial transfers will be deemed to have received the application on the date they receives the partial transfer and will have 20 days from that date in which to decide the application.

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53. *Government Information (Public Access) Act 2009*, sections 45 and 46.

- 5.10 Section 80(b) provides that a decision to transfer an access application is a reviewable decision. An application for an internal review of such a decision will need to be made to the original recipient agency. However, any substantive decisions made by an agency that received a partial transfer (relating to the part of the application that it received) will be internally reviewable by the second agency as the relevant decision maker.

#### **Recommendation 4**

Amend Division 2 of Part 4 of the GIPA Act to:

- Allow the partial transfer of an access application between agencies where the agency that originally received the access application holds some, but not all, of the information requested
- Allow agencies that receive partial transfers to impose processing charges (but not application fees) for processing the relevant part of the application.

### **Consultation on public interest considerations**

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- 5.11 Under section 54 of the GIPA Act, agencies must take such steps (if any) as are reasonably practicable to consult with 'a person' ('third party') before providing an applicant with access to information relating to the third party, if it appears that:
- The information is of a kind that requires consultation under section 54 (the third party's personal information; information that concerns the third party's business, commercial, professional or financial interests; research by the third party; or information that concerns the affairs of the Commonwealth or another State government, where the third party is that government)
  - The third party may reasonably be expected to have concerns about the disclosure of the information and
  - The third party's concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.<sup>54</sup>
- 5.12 The views of third parties about the disclosure of the information are relevant when agencies apply the public interest considerations balancing test under section 13 to determine whether there are any overriding public interest considerations against disclosure.
- 5.13 A number of submissions from agencies argued that the current requirements on agencies to consult with third parties are too onerous.<sup>55</sup>
- 5.14 While we recognise that third party consultations can be time consuming and resource intensive, they are an important requirement when processing access applications for information relating to third parties. The requirement that interested

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54. *Government Information (Public Access) Act 2009*, section 54.

55. For example, see submissions from Treasury and Finance, Planning and Environment and a number of local councils.



third parties be consulted ensures that agencies have sufficient information to conduct the section 13 balancing test correctly. Further, there are options available to allow agencies to reduce any burden flowing from third party consultation, such as extending the time they can take to decide applications, or redacting information pertaining to the third party in accordance with section 74 of the GIPA Act.

## Consultation between agencies

- 5.15 As discussed above, section 54 of the GIPA Act requires that, before information relating to a third party is provided to an applicant, an agency must consult with the third party.
- 5.16 A small number of submissions, most notably the submission made by the Crown Solicitor's Office, indicated that agencies continue to have some uncertainty about whether other agencies are 'persons' (third parties) for the purposes of section 54, and when and how recipient agencies can consult with third party agencies in processing access requests. Such circumstances may arise, for example, where a recipient agency holds information that was produced cooperatively with another agency, or where a recipient agency holds information created by another agency, which the other agency has shared with the recipient agency. In particular, some agencies have expressed their concern that, by consulting with other agencies about the disclosure of information requested by individual applicants, they may be at risk of breaching the Information Protection Principles contained in the PPIP Act, which govern the collection, use, retention and security, and disclosure of personal information.
- 5.17 A legislative note to section 54 clearly states that the requirement to consult extends to consultations with other agencies, and references Schedule 4 to the GIPA Act, which defines a 'person' to include 'an agency'. In addition, section 5 of the PPIP Act provides that 'nothing in [that] Act affects the operation of the [GIPA Act],' and section 25 of the PPIP Act provides that public sector agencies are not required to comply with certain sections of the PPIP Act if non-compliance is otherwise permitted by another Act or law.
- 5.18 We note that there is nothing in the GIPA Act that currently prevents inter-agency consultation in determining access applications, and, indeed, several agencies have advised that they consider that the requirements and conditions for inter-agency consultation are already sufficiently clear. Nevertheless, the concerns expressed by some agencies indicate that there is some room for confusion, and that inter-agency consultations could be encouraged with a more explicit statement of permission within the GIPA Act. We therefore recommend that Division 3 of Part 4 be amended to specify that recipient agencies are permitted to consult with third party agencies in determining access applications.

### Recommendation 5

Amend Division 3 of Part 4 of the GIPA Act to specifically authorise agencies to consult with other agencies for the purpose of assisting the first agency to reach a decision on whether an overriding public interest against disclosure exists.

## Time frames

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- 5.19 The GIPA Act requires an agency to notify an applicant of whether their access application is valid within 5 working days of receipt,<sup>56</sup> and to make, and notify the applicant of, a decision on the application within 20 working days of receipt.<sup>57</sup>
- 5.20 Although 93 per cent of applications received in 2015-2016 were decided within the statutory timeframe, submissions raised three issues with respect to decision timeframes under the GIPA Act.

## Complex requests

- 5.21 Some agencies raised concerns with the difficulty of complying with the 20 working day period in which to decide applications for large volumes of information, applications requiring extensive searches or third party consultation, and applications for information held by third party service providers.<sup>58</sup> It was submitted by some agencies that, upon receiving a 'complex' application request, the agency should be given additional working days in which to process and decide the request. Certain agencies submitted that their current ability to negotiate extensions of time with applicants is not adequate to manage these types of applications.
- 5.22 We do not consider that the GIPA Act's timeframes for processing and deciding access applications should be extended. We recognise that the timeframes can sometimes be difficult for agencies to meet, particularly where the access request relates to a large volume of information, processing the application requires extensive searches of third party consultations, or the relevant information is difficult to locate or collate. Nevertheless, we note the GIPA Act's objective of providing timely access to government information, and consider that the Act's provisions allowing agencies to negotiate extensions of time (or to limit the scope of applications)<sup>59</sup> offer sufficient flexibility. We note that it is in an applicant's interest to agree to an extension in such circumstances, as refusing to agree to an extension or to narrow the scope of an application may lead to a deemed refusal, or access to only some of the information requested.
- 5.23 We do not consider extending the decision time period within the Act is necessary.

## Stopping the clock

- 5.24 The NSW Electoral Commission submitted that, in circumstances where it is assisting applicants to narrow the scope of an access application, the time period for deciding the application should stop running while the scope of the application is determined.<sup>60</sup>

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56. *Government Information (Public Access) Act 2009*, section 51(2).

57. *Government Information (Public Access) Act 2009*, section 57(1).

53. For example, see submissions from Legal Aid NSW and the Department of Family and Community Services.

59. *Government Information (Public Access) Act 2009*, section 57.

60. As distinct from circumstances under section 60(4), whereby, before an agency can *refuse* to deal with an access application because to do so would require an unreasonable and substantial diversion of an agency's resources, the agency must negotiate with the applicant to narrow the

- 5.25 We consider that ‘stopping the clock’ while the scope of applications is determined is unnecessary. Agencies already have capacity to negotiate an extension to the decision period with the applicant during this phase of the process, which it is in the interests of the applicant to agree to, to avoid a ‘deemed refusal’.
- 5.26 We conclude that amending the Act to include events that ‘stop the clock’ during the decision period would create additional and unnecessary complexity.

### The definition of working days

- 5.27 The M2016-01 Premier’s Memorandum, Christmas Closedown 2016-2018 provides that all areas of the Government sector not involved in the delivery of frontline services are encouraged to close down over the Christmas/New Year period each year.<sup>61</sup> While these agencies may have few staff at work during the closedown period, any days during that period that are not public holidays nevertheless count as ‘working days’ for the purposes of the GIPA Act.
- 5.28 Nine agencies submitted that they have difficulty complying with decision timeframes for applications received during or around closedown periods. There may not be enough staff available to process applications or conduct searches, and business centres that hold relevant information may be closed. Negotiating extensions to the decision period prior to or during the closedown period can also be difficult, with some applicants not able to be contacted over the Christmas period, or few departmental staff available to negotiate extensions. This can lead to a higher than average number of applications received over this time becoming ‘deemed refusals’.
- 5.29 The Information Commissioner considers that excluding days that fall within the closedown period from the definition of ‘working days’ will provide a benefit to NSW Government agencies, ‘arguably at a cost to applicants.’ The Information Commissioner also submits that this will ‘introduce a significant discretion in processing times’, and ‘could result in greater uncertainty and inconsistency for applicants’, and that agencies already have the ability to negotiate extensions of processing time with applicants.
- 5.30 We recommend amending the definition of ‘working days’ in the GIPA Act to take into account Christmas closedown periods. We acknowledge that this recommendation will have the effect that some applications lodged around the Christmas period may be decided slightly later than those lodged at other times of the year, however, we consider that this recommendation will ultimately facilitate better decision making and greater access to government information for applicants.
- 5.31 We acknowledged that there are sound policy reasons why access applications should be decided as quickly as possible, and extensions should be agreed with applicants. However, we also consider that there is also a strong public interest in having applications substantively decided (rather than rendered ‘deemed refusals’ if they cannot be made within time and extensions cannot be negotiated). We also consider that, as the days that will be excluded by this amendment are relatively few (totalling seven working days in 2017-18), applicants are not likely to be significantly adversely affected. We also consider that the amendment as proposed will not introduce any ‘discretion’ as to processing times, nor lead to uncertainty or

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scope of the application, during which time the decision period stop running. Decisions to refuse to deal with access applications are discussed further at 5.33.

55. Premier’s Memorandum, M2016-01, Christmas Closedown 2016-2018.

inconsistency; the days which will be excluded can be clearly and objectively identified.

- 5.32 We conclude that excluding closedown days from the definition of ‘working days’ is likely to ease administrative strain on agencies, and result in more applications received around the Christmas closedown period being decided within the statutory timeframe (and thus, more applicants receiving access to the information they have requested). We consider that this amendment is in the best interests of applicants and agencies, and ultimately supports the objectives of the Act.

### **Recommendation 6**

Amend the definition of ‘working days’ in clause 1 of Schedule 4 to the GIPA Act to exclude days within the Christmas shutdown period.

## **Decision to refuse to deal with an application**

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- 5.33 Section 60(1) of the GIPA Act provides several reasons for which an agency may refuse to deal with access applications in whole or in part. Two of those reasons were discussed in several submissions.

### **Unreasonable and substantial diversion of resources: section 60(1)(a)**

- 5.34 Section 60(1)(a) of the GIPA Act provides that an agency can refuse to deal with an application that would require ‘an unreasonable and substantial diversion of the agency’s resources’.<sup>62</sup>

- 5.35 A range of stakeholders submitted that there is insufficient clarity about what amounts to ‘an unreasonable and substantial diversion of resources’. For example, Legal Aid said:

even with reference to available case law ... it can be difficult for agencies to gauge whether they should apply s 60(1)(a). This can result in agencies spending significant amounts of time processing requests just to be sure they are not in breach of the legislation, or alternatively, using the subsection to unfairly refuse a request, for example by overestimating the time to process an application.<sup>63</sup>

- 5.36 Many submissions argued that adding a non-exhaustive list of factors demonstrating what constitutes ‘an unreasonable and substantial diversion’ would assist agencies in interpreting section 60(1)(a).
- 5.37 Two key New South Wales Administrative Decisions Tribunal (**NSWADT**) decisions provide guidance on the interpretation of this subsection: the decision of *Colefax v Department of Education and Communities No. 2 (Colefax)*,<sup>64</sup> and the earlier decision of *Cianfrano v Director General, Premier’s Department*

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56. *Government Information (Public Access) Act 2009*, section 60(1)(a).

57. Legal Aid Commission of NSW, *Submission to the Statutory Review of the Government Information (Public Access) Act 2009*.

64. *Colefax v Department of Education and Communities No 2* [2013] NSWADT 130.

(*Cianfrano*).<sup>65</sup> In both these cases, the NSWADT considered the sorts of factors that might indicate whether processing a request could constitute ‘an unreasonable and substantial diversion of resources’.<sup>66</sup> While some of the factors considered in these cases were particular to their respective facts, several had wider applicability, including:

- (a) The public interest in releasing the information
- (b) The estimated volume of information involved in the request
- (c) The demonstrable importance of the information to the applicant
- (d) Whether the request is reasonably manageable, bearing in mind the size and particular resourcing of the agency
- (e) The timeframe within which the agency was bound to respond.

5.38 Both decisions warned that the list of factors they considered is non-exhaustive, and the weight to be given to any one factor would depend on the circumstances surrounding each application.

5.39 A decision to refuse to deal with an access application on the grounds of an unreasonable and substantial diversion of resources is a significant one. A refusal denies the applicant’s right to information, and may be contrary to the objects of the GIPA Act. As Judicial Member Molony concluded in *Colefax*:

In addition to these factors, however, an access applicant under the GIPA Act has statutory right to access government information, and the Act instructs that discretions under it be exercised so as to enhance its objects. These legislative provisions apply with respect to applications under the GIPA Act and may result in the differing weight and importance being accorded to the *Cianfrano* factors.<sup>67</sup>

5.40 Section 60(1)(a) has caused some uncertainty for agencies and applicants. We consider that it should be amended to incorporate a non-exhaustive list of factors (drawing on previous legislative interpretation) that decision makers can refer to when applying section 60(1)(a).

5.41 The following factors have wide applicability and we recommend inserting these into the legislation:

- The public interest in releasing the information is a highly relevant factor in keeping with the objects of the GIPA Act and the overriding principle that information should be released unless there is a strong public interest consideration against release
- The estimated volume of information involved in the request will assist the agency in estimating how long an application will take to process
- The demonstrable importance of the information to the applicant is by necessity a highly subjective factor and should be considered alongside the first factor

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65. *Cianfrano v Director General, Premier’s Department*, [2006] NSWADT137. This decision was made under the old Act, the *Freedom of Information Act 1989*.

66. For example, see *Cianfrano v Director General, Premier’s Department*, [2006] NSWADT137, paragraph 51.

67. *Colefax v Department of Education and Communities No 2* [2013] NSWADT 130, paragraph 26.

(the public interest). This factor should include whether the information could affect their ability to assert rights under other laws. For example, it could facilitate access to primary identification documents or provide access to evidence for other legal claims, including under the *Victims Rights and Support Act 2013*

- Whether the request is a reasonably manageable, bearing in mind the size and particular resourcing of the agency
- The timeframe within which the agency was bound to respond. In the GIPA Act, agencies are required to decide an application within 20 working days.

#### **Recommendation 7**

Amend section 60(1)(a) of the GIPA Act to provide a list of non-exhaustive factors that decisions makers may consider when deciding whether dealing with an application would involve an unreasonable and substantial diversion of an agency's resources. The factors can include:

- The public interest in releasing the information
- The estimated volume of information involved in the request
- The demonstrable importance of the information to the applicant
- Whether the request is reasonably manageable, bearing in mind the size and particular resourcing of the agency
- The timeframe within which the agency is bound to respond.

### **Information subject to court proceedings**

5.42 Under section 60(1)(d), an agency can refuse an access application if the information requested is or has been the subject of a subpoena or other court order for the production of documents, and the information is available to the applicant as a result of having been produced in compliance with the order.<sup>68</sup>

5.43 Several submissions suggested that section 60(1)(d) be expanded (or a new subsection (1)(e) be inserted) to also allow agencies to refuse certain applications to access material that is relevant to court proceedings that are already underway. These submissions suggested that, at present, it would be possible for a GIPA Act application to be made by a party to proceedings (or individuals acting in concert with such a party) to facilitate swifter access to information relevant to those proceedings, or to avoid costs that might apply to discovery. Agencies that commented on this possibility suggested that this had potential to:

- Circumvent the inherent jurisdiction of the court to control its own processes<sup>69</sup>
- Lead to duplication of work for agencies, and provision of the same information multiple times.

68. *Government Information (Public Access) Act 2009*, section 60(1)(d).

69. Crown Solicitor's Office, Review of the GIPA Act, 19 September 2014.

- 5.44 The submissions received did not provide clear guidance as to how prevalent the practice of parties (or persons acting in concert with parties) to proceedings making GIPA Act applications for information relevant to those proceedings is. For that reason, the Review has not been able to determine how significant the potential burden on agencies might be, nor how many applicants might be affected by an amendment allowing agencies to refuse such applications.
- 5.45 We appreciate, however, that in complex litigation, requiring agencies to gather information under two possibly competing, and not necessarily concurrent, processes is potentially disadvantageous for agencies. Noting that individuals are in no way restricted in their ability to make GIPA Act applications to gather material which might be relevant to future proceedings *before* those proceedings commence, and in deference to standing court procedures, we consider that there is value in amending section 60(1) to include a further reason for refusal (a new subsection (1)(e)). However, we consider that the proposed section 60(1)(e) reason should be caveated and conditional.
- 5.46 We propose that section 60(1)(e) be inserted into the GIPA Act to the effect that an agency *may* (discretionary) refuse to deal with an access application where:
- It appears to the agency on reasonable grounds that the applicant has sought access to the information in relation to current court proceedings to which the applicant is a party, or to which a person with whom the applicant is acting in concert is a party, and
  - There is a reasonable expectation that the party to the proceedings will receive access to the information in the course of the court proceedings (for example, via a discovery order).

### **Recommendation 8**

Amend section 60(1) of the GIPA Act to insert a new subsection (1)(e) to the effect that an agency *may* refuse to deal with an access application where:

- There is evidence to show that the applicant, or someone with whom the applicant is acting in concert, is a party to current court proceedings, and
- The party to the proceedings would be able to apply for the information under the court's own procedures (for example, by a discovery order).

## 6. Fees and charges

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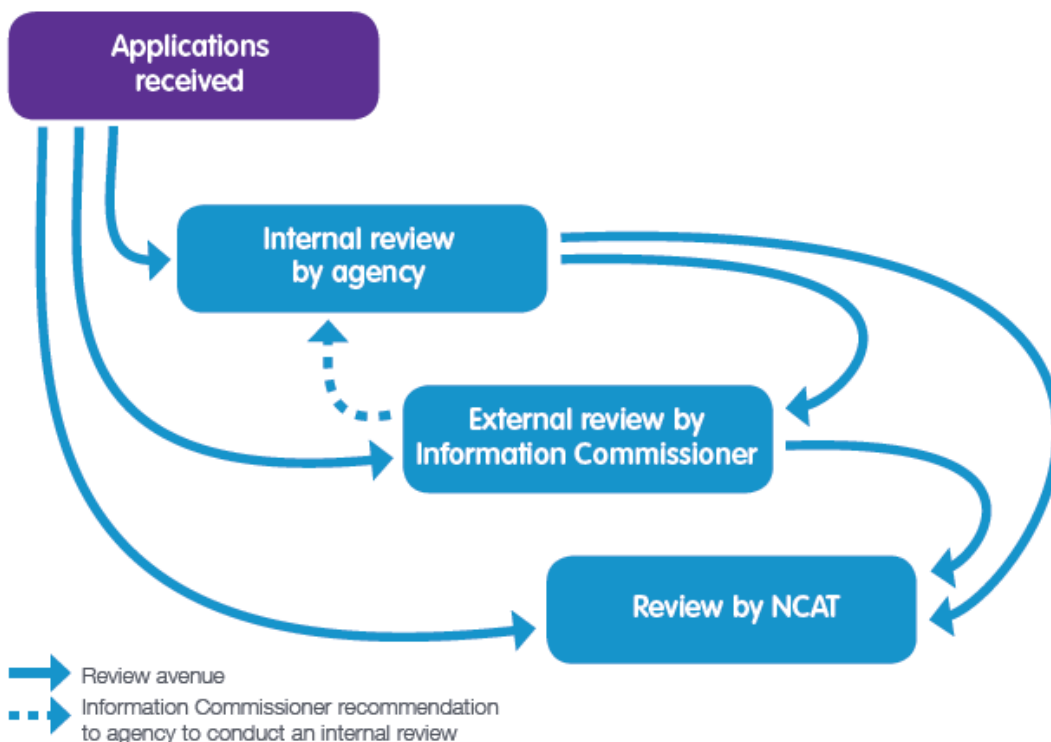
- 6.1 Under the GIPA Act, a \$30.00 application fee is imposed for access applications, and agencies that receive applications may also impose charges for processing those applications (\$30.00 per hour, excluding the first 20 hours of processing applications for personal information, and subject to reduction in certain circumstances, such as the applicant's financial hardship). Applications for internal reviews carry a \$40.00 fee.
- 6.2 A number of submissions discussed the current fees and charges imposed under the GIPA Act. Some submissions argued for the reduction or abolition of fees and charges, some argued for the status quo to be maintained and some, particularly those from government agencies and local councils, argued for increased fees and charges. Local councils in particular noted that allowing fees and charges to be increased would go some way to alleviating the costs associated with making DAs and related documents subject to open access (as discussed at 4.3 above).
- 6.3 Currently, the application fees and processing charges that can be imposed under the GIPA Act are nominal, and are comparable to those imposed in other Australian jurisdictions. In addition, as above, processing charges can be reduced in certain circumstances, and are not imposed for the first 20 hours of processing applications for personal information.
- 6.4 Recent reviews of access application fees and charges in Australia and elsewhere have found no compelling case for increasing fees and charges in their respective jurisdictions. These include the Australian Information Commissioner, Professor John McMillan's Review of charges under the *Freedom of Information Act 1982* (Cth): Report to the Attorney-General, the 2013 review conducted by Allan Hawke AC of the Commonwealth *Freedom of Information Act 1982*, and the 2016 UK *Independent Commission on Freedom of Information Report*.
- 6.5 We do not consider that there is a strong case to change the GIPA Act's current access application fees, processing charges or discount scheme. We also consider that the recommendation made at 4.9 above, concerning excluding DAs and associated documents created before the introduction of the GIPA Act from the definition of 'open access information', will help address the resource concerns of local councils.



## 7. Internal and external review of GIPA Act decisions

- 7.1 Part 5 of the GIPA Act sets out the process by which 'reviewable decisions' (as defined under section 80) are reviewed. Review can be by way of internal review, external review or both, as represented in the following diagram and explained further below. We consider that the list of reviewable decisions under section 80 remains appropriate to achieving the objects of the GIPA Act. We propose some reforms outlined below to strengthen the review processes.

Figure 32: The relationship between the review pathways in Part 5, GIPA Act



Source: The Information Commissioner, 'Report on the Operation of the *Government Information (Public Access) Act 2009*'.<sup>70</sup>

### Current internal and external review processes

#### Internal review

- 7.2 A person who is aggrieved by a reviewable decision may apply to have that decision reviewed by the decision making agency (**internal review**). Applications for internal review must be made within 20 working days of the party being notified of the reviewable decision, and must be accompanied by a \$40.00 application fee.<sup>71</sup>

70. Information Commissioner, Report on the Operation of the *Government Information (Public Access) Act 2009* 2014/2015, page 50

71. The *Government Information (Public Access) Act 2009*, section 85(1) and section 85(2) provides that no fee is payable where the decision reviewed is a deemed refusal due to expiry of time.

- 7.3 In conducting an internal review, the decision making agency makes a new decision, as if the original decision had not been made. The agency must complete the review within 15 working days.
- 7.4 Internal reviews are typically undertaken more quickly, and are less resource intensive, than external reviews. They provide agencies with an early opportunity to reconsider their original decision and correct any errors without external intervention. They also allow agencies to monitor the quality of their original decisions, and identify and correct systemic issues, ultimately encouraging better primary decision making.

### External review

- 7.5 A person who is aggrieved by a reviewable decision is also entitled to have the decision reviewed by the Information Commissioner and/or the New South Wales Civil and Administrative Tribunal (**NCAT**) (**external review**). Applications for external review must be made within 40 working days of notification of the reviewable decision.<sup>72</sup>

#### *External review – Information Commissioner*

- 7.6 Upon receiving an application for external review, the Information Commissioner can agree to conduct the review, refuse to conduct the review, or refer the application to NCAT. The Information Commissioner can only conduct an external review where the reviewable decision has previously been subject to internal review *unless* the applicant for external review was also the applicant who made the access request, or internal review is not available under Part 5 of the GIPA Act.
- 7.7 In conducting an external review, the Information Commissioner is empowered to make non-binding recommendations only. Potential recommendations include that:
- The decision making agency reconsider the decision and make a new decision
  - The decision making agency conduct an internal review
  - There is an overriding public interest against the disclosure of the relevant information
  - Any general procedure of the decision making agency be changed to comply with or further the object of the GIPA Act.

#### *External review - NCAT*

- 7.8 Unlike the Information Commissioner, NCAT can conduct an external review of any reviewable decision, regardless of whether an internal review has already been sought. This has potential to encourage third parties to seek external review by NCAT as a first option (noting that third parties must seek internal review prior to seeking external review by the Information Commissioner).
- 7.9 Pursuant to its powers under the *Administrative Decisions Review Act 1997* (**the ADR Act**), NCAT can affirm or vary the original decision, set aside and

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72. *Government Information (Public Access) Act 2009*, sections 90 and 101.

substitute the original decision, or set aside the original decision and remit it to the decision making agency for reconsideration.<sup>73</sup>

## Stakeholder concerns

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- 7.10 The Information Commissioner's most recent report on the operation of the GIPA Act indicated that, in 2015-16, a total of 14,761 valid access applications were made under the GIPA Act, and 818 decisions on those applications were subject to review (6 per cent of valid applications).<sup>74</sup> The Information Commissioner also reported that, in 2014-15, 54 per cent of internal and external reviews upheld the original decision, increased from 28 per cent in 2013-14.<sup>75</sup> This data indicates that, in general, only a small number of decisions made under the GIPA Act are subject to review, and the majority of those are reviewed are upheld.
- 7.11 Although the number of decisions made under the GIPA Act that are actually reviewed is relatively low, a significant number of submissions raised concerns with the current review processes. These included that:
- Applicants should not have to pay a fee for internal review
  - Agencies should have 20, rather than 15, working days within which to complete internal reviews
  - The current interaction between internal and external review processes is unnecessarily complex and circular, particularly in relation to the Information Commissioner's power to recommend internal review
  - External reviews by the Information Commissioner can be subject to significant delays, and often do not add value due to the non-binding nature of the Information Commissioner's recommendations
  - It is possible for multiple, concurrent reviews relating to the same application to be underway in different forums at the same time.
- 7.12 With respect to the final concern above, Trade and Investment NSW described a situation in which:
- 26 third parties sought internal review of that part of the decision releasing their information, some of whom then subsequently applied for external review by the Information Commissioner. The original GIPA [Act] applicant, however, had immediately sought external review by the then Administrative Decisions Tribunal (ADT) against that part of the decision to refuse access to some third party information. The internal reviews were decided prior to the ADT matter being settled and were then subject to referral by some of the third parties to the Information Commissioner for external review. Further rights of review by the ADT then attached to the outcome of the Information Commissioner review, even though this concerned the same information that had previously been subject to ADT review.

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73. *Administrative Decisions Review Act 1997*, section 63.

74. Information Commissioner, 'Report on the Operation of the *Government Information (Public Access) Act 2009, 2015-2016*', page 60

75. Information Commissioner, 'Report on the Operation of the *Government Information (Public Access) Act 2009, 2015-2016*', page 56-57.

- 7.13 To address these concerns, a number of stakeholders suggested that the GIPA Act's review processes should be amended to reflect the following principles:
- Review pathways should be straightforward and linear, with a clear escalation from one stage of the process to the next
  - Each stage of the review process should be completed in a timely fashion and a decision should be reached without delay
  - Review processes should promote access to justice for aggrieved persons
  - Applications for review should be resolved in the most efficient manner
  - The number of different review processes with respect to different aspects of the same access application should be minimised.
- 7.14 The Information Commissioner also suggested that, as an alternative to formal review processes, the GIPA Act or the GIIC Act could be amended to allow the Information Commissioner to use alternative dispute resolution mechanisms to facilitate mutually agreeable resolutions between applicants and agencies. In particular, the Information Commissioner suggested that a conciliation model might be explored.

### **Clearer internal and external review processes**

- 7.15 We consider that a number of improvements are needed to help make the GIPA Act's review processes clearer and simpler. The changes we propose are designed to:
- Encourage applicants to seek internal review of decisions before pursuing external review
  - Preserve third party review rights while ensuring that the exercise of those rights does not result in unnecessary duplication of work and does not excessively delay the release of government information
  - Remove the potential for circularity that exists in the current review process by providing a linear, progressive pathway.

#### **Internal review**

- 7.16 To improve internal review processes generally, we recommend that the Information Commissioner exercise her advisory and education functions to provide greater oversight of agencies' internal review mechanisms. This will promote more consistent and high-quality internal reviews. We suggest that the Information Commissioner's oversight activities involve working with agencies to develop and publish internal review policies and procedures, and providing education and advice.
- 7.17 Giving the Information Commissioner broad oversight over internal review will allow the Commissioner to have a better understanding of how effectively internal review processes are operating within individual agencies and assist agencies to develop

their internal review practices. This will help build confidence in the efficacy of those processes and practices into the future.

- 7.18 We do not consider it necessary to extend the internal review period to 20 working days. Although an agency must make a new decision, some of the work involved in that decision – like searches for information and identifying and consultation with interested third parties – should already have been undertaken in making the original decision. Where agencies need more time, they may negotiate with the applicant to extend the review period. We also note that section 86(2) provides that the time period is automatically extendable by 10 days where new consultations are required, without requiring the applicant’s consent. There is also an incentive for applicants to agree to an extension for an internal review decision because they are then more likely to receive the information they are seeking, and less likely to require an application to NCAT.
- 7.19 Noting the above, we recommend that an amendment be made to timeframes within which agencies must complete internal reviews in cases where *more than one party* has a right to seek review. At present, an applicant or interested third party has 20 working days after being notified of a reviewable decision within which to lodge an application for internal review.<sup>76</sup> It is therefore possible for an applicant to apply for internal review the day after being notified of the original decision (with the review decision then due 16 working days after the applicant was notified of the original decision), and a third party to seek review 20 working days after being notified of the original decision (with the review decision due 35 working days after the third party was notified of the original decision). This creates the possibility that two, potentially competing reviews may be underway concurrently, or sequentially, creating uncertainty for parties and duplication for agencies.
- 7.20 We propose that, where more than one interested party has a right to seek internal review of a decision, the review period should start running on the day all parties’ review applications are received, or on the 21<sup>st</sup> working day after the parties are notified of the original decision. This will allow agencies to consider multiple associated applications for internal review at the same time, or in the knowledge that no other interested party will later seek a review. This change would only apply (and therefore only delay commencement of a review) in cases where there is a reasonable prospect that a decision, or an aspect of a decision, under review will materially affect the rights or interests of more than one party.

### **Recommendation 9**

Amend section 86 of the GIPA Act to provide that, in cases where more than one party has a right to seek internal review of a decision, the 15 working days within which an agency is required to complete an internal review may begin on the day all interested parties’ applications are received, or upon the expiration of the 20 working days within which aggrieved persons are required to lodge their applications for internal review (whichever is earlier). However, agencies should retain discretion to commence the review period as soon as an application is received.

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76. *Government Information (Public Access) Act 2009*, section 83.

- 7.21 A number of submissions suggested that internal review should be mandatory in all cases. However, we consider that requiring applicants to pursue a review process that requires payment of an application fee has potential to be disadvantageous to some parties.
- 7.22 Most of the agencies that prepared submissions or were consulted during the Review supported retaining the application fee for internal reviews. They submitted that the fee helps deter unmeritorious applications for internal review, and is reasonable in light of the resources required to conduct internal reviews.
- 7.23 In light of the strong support for retaining the internal review application fee, and the competing views on mandating internal review, we conclude that the existing internal review process should remain in its current form. Noting that the application fee may discourage or prevent some applicants from seeking internal review, however, we recommend that a legislative note be added to section 85 of the GIPA Act, cross referencing section 127, which provides that an agency is entitled to waive, reduce or refund any fee or change payable or paid under the GIPA Act in any case the agency thinks is appropriate.

#### **Recommendation 10**

Include a note to section 85 of the GIPA Act cross-referencing section 127.

#### ***External review – Information Commissioner***

- 7.24 A significant number of submissions raised concerns about the operation of the Information Commissioner's external reviews. For the most part, we consider that these concerns do not arise from the operation of the GIPA Act or the GIIC Act. Instead, it appears that they stem from practical and historical difficulties with the operation of the review function within the IPC, which have created backlogs of review applications.
- 7.25 We note that the IPC has been working to improve case handling and has achieved a reduction in the time it takes to finalise review matters. This work is continuing. For example, the number of open cases at the IPC has dramatically reduced and the average time taken to finalise review matters has also decreased.
- 7.26 Noting the above, the Review considers that some amendment to the processes for external review by the Information Commissioner is warranted.
- 7.27 We recommend removing the potential for circularity inherent in the Information Commissioner's power to recommend decisions be subject to internal review. In circumstances where a decision has already been reviewed by the Information Commissioner, and the Commissioner has referred the matter back to the agency for reconsideration or internal review, we recommend that the applicant cannot seek another review by the Information Commissioner.
- 7.28 We recommend amending Division 3 of Part 5 to provide that the Information Commissioner cannot review a decision that has already been subject to a review by the Information Commissioner. In circumstances where an applicant disagrees with the agency's decision made subsequent to a recommendation from the Information Commissioner, the only review option open to an applicant is NCAT.

- 7.29 We have not recommended that the GIPA or the GIIC Act be amended to provide for the Information Commissioner to facilitate alternative dispute resolution mechanisms at this time. Under the GIIC Act, the Information Commissioner's functions already include facilitating the direct resolution of complaints by parties to complaints, including by conciliation or other informal processes. We did not receive any submissions to suggest that these options to resolve complaints were insufficient. In addition, the GIPA Act is framed in positive terms, with agencies encouraged to release information and members of the public empowered to seek access to information. We are concerned that reframing the interaction of agencies and members of the public in terms of 'disputes' would recast the GIPA Act in more adversarial terms. Finally, the Review considered that, noting the Information Commissioner's established roles, there would be a risk of a conflict of interest if the Commissioner was tasked with both facilitating dispute resolution, and, in the event that resolution failed, then conducting an 'external review' of the original decision.
- 7.30 The Department will continue to monitor the operation of both the GIPA Act and the GIIC Act, particularly in light of amendments recommended in the Review, and may revisit this issue in the future.

#### **Recommendation 11**

Amend Division 3 of Part 5 of the GIPA Act to provide that the Information Commissioner cannot review a decision that has already been subject to a review by the Information Commissioner.

- 7.31 To address the current potential for delays, and provide more certainty around timeframes, the Review recommends that the GIPA Act be amended to introduce a statutory timeframe within which the Information Commissioner must complete an external review. More specifically, the Review recommends that the Information Commissioner must complete any external review within 40 working days of receiving all the information the Commissioner deems necessary to undertake that review (subject to extension with the consent of the parties). If a review decision is not rendered within this timeframe, the original decision should be taken as upheld, after which the only external review option for an aggrieved party is by NCAT. We note that the Information Commissioner has powers under Division 4 of the GIIC Act, including section 25, to require an agency to provide information or produce a record or thing, or a copy of a record at a time and place specified by the Commissioner. Use of these powers can assist the Commissioner to conduct timely reviews and meet any new statutory timeframe.

#### **Recommendation 12**

Amend the GIPA Act to provide that:

- The Information Commissioner has 40 working days from the day on which the Commissioner receives all necessary information relating to a review application to complete a review of a decision;
- The review period can be extended with the consent of the parties;
- If the review is not completed within the review timeframe, the original decision stands, and the only option available to the applicant is to seek a review by NCAT.

- 7.32 We do not recommend that the Information Commissioner be given binding powers in external reviews, noting the marked opposition to this proposal from most agencies, and the potential this raises for a conflict with Information Commissioner's educative and advisory functions.

***External review – NCAT***

- 7.33 The Review recommends that, before third parties can seek external review by NCAT, they should be required to seek an internal review.
- 7.34 The Review considers that aggrieved persons who are primary applicants (that is, the person who made the original access application) should retain the choice over the forum in which they choose to lodge review applications.

**Recommendation 13**

Amend section 100 of the GIPA Act to include a provision akin to section 89(2) of the GIPA Act, to require a third party to seek internal review prior to seeking NCAT review.



## 8. Unmeritorious applications and improper conduct

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### Applying for restraint orders in response to unmeritorious applications

- 8.1 Section 110 allows an agency to apply to NCAT to seek a restraint order against an applicant where the applicant has made at least three access applications in the previous two years that lack merit.
- 8.2 Some government agencies have submitted that it is difficult to enliven section 110 and use it effectively to manage unmeritorious applications and vexatious applicants. This affects agencies' ability to process meritorious applications and can cause delays. Government agencies submitted that the process of seeking restraint orders from NCAT, which requires an agency to prove that prior applications were lacking in merit, can be difficult and time consuming, and can sometimes outweigh the burden of continuing to manage unmeritorious applications.<sup>77</sup> Finally, some government agencies submitted that, even if a restraint order is sought, vexatious applicants can continue to make further vexatious applications through other people.
- 8.3 The Review has identified a number of ways to improve the operation of this section. Firstly, the Review proposes that, to reduce the burden on agencies seeking restraint orders, if NCAT has already made a finding in earlier proceedings that an application is lacking in merit, that finding can be taken to apply for the purposes of proving that at least three prior applications were lacking in merit. This will remove the need for the agency to re-establish that certain prior applications lacked merit.
- 8.4 The Review also proposes to introduce the concept of applicants 'acting in concert' (already used in section 60(3)) for the purpose of seeking and making restraint orders. This would mean that persons who are acting in concert with a primary applicant who is already subject to a restraint order can also be restrained by the order in the same terms or terms outlined in the order.

### Managing applications for approval to make further applications

- 8.5 Section 110(1) allows NCAT to make an order that an applicant subject to a restraint order cannot make further access applications without first seeking the approval of NCAT. This could be problematic, as an applicant subject to a restraint order could potentially make persistent applications to NCAT for approval, abusing the time and resources of both NCAT and agencies, which are required to respond to those applications in each case.
- 8.6 In addition, the GIPA Act does not provide a framework to direct NCAT as to the types of factors it should consider when an applicant who is subject to a restraint order applies to NCAT for approval to make a further GIPA Act application, as discussed in the recent case of *Walker v Pittwater Council*.<sup>78</sup> This case led to NCAT reasoning that it was only required to consider whether the proposed GIPA Act application was lacking in merit. Where it was not lacking in merit, NCAT found that it should allow the application, even where a restraint order was in place.

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77. For example, see submissions from the (then) Department of Education and Communities, Department of Family and Community Services, Department of Justice (Office of the General Counsel), Department of Premier and Cabinet, and multiple local councils.

78. *Walker v Pittwater Council* [2016] NSWCATAD 78.

- 8.7 We propose that NCAT be given greater flexibility in relation to the terms of the restraint orders it can issue. For example, NCAT should be able to order that an applicant subject to a restraint order can only make a specified number of applications in a given timeframe (whether in total, to a particular agency or agencies, or in relation to particular subjects).
- 8.8 We also recommend defining the kinds of factors that NCAT should take into account in deciding whether to allow a GIPA Act application by an applicant who is subject to a restraint order. These factors would include whether the proposed application is lacking in merit, the number of previous GIPA Act applications the applicant has submitted that were lacking in merit, whether the applicant has behaved in a manner that was threatening or harassing, and whether the conduct of the applicant in making repeated applications constituted an abuse of process.

#### **Recommendation 14**

Amend section 110 of the GIPA Act to:

- Allow NCAT to make restraint orders covering others who may be ‘acting in concert’ with the primary applicant
- Allow NCAT to accept that an application is lacking in merit where it has previously found that application to be lacking in merit
- Give NCAT greater flexibility in determining the terms of restraint orders
- Direct NCAT as to the kinds of factors that should be considered where an applicant subject to a restraint order seeks permission from NCAT to make a further application.

### **Report on improper conduct**

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- 8.9 Section 112 of the GIPA Act provides that if, as a result of an administrative (external) review, NCAT is of the opinion that an officer of an agency has failed to exercise a function under the GIPA Act in good faith, NCAT may bring the matter to the attention of the Minister responsible for the relevant agency.<sup>79</sup> Two concerns were raised with respect to this section.
- 8.10 Firstly, section 112 may lose its force when the relevant Minister to whose attention a particular matter would otherwise be brought is already a party to the proceedings before NCAT. This circumstance arose in the case of *Shoebridge v The Office of the Minister for Police and Emergency Services*.<sup>80</sup> To address this, we propose that section 112 be amended to empower NCAT to make a report to the Information Commissioner, rather than the relevant Minister, in these circumstances.
- 8.11 Secondly, NCAT has submitted that parties to external reviews of decisions relating to access applications have relied on section 112 to bring subsequent applications for determinations under this section. This has led to NCAT conducting satellite

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79. *Government Information (Public Access) Act 2009*, section 112.

80. *Shoebridge v The Office of the Minister for Police and Emergency Services* [2014] NSWCATAD 189.

proceedings separate to the administrative (external) review of the substantive application for information.<sup>81</sup>

- 8.12 Section 112 of the GIPA Act does not expand NCAT's jurisdiction, or create a right to a separate hearing, as demonstrated in the Tribunal's decision in the recent cases of *Zonneville v NSW Department of Finance and Services (Zonneville)*.<sup>82</sup> In *Zonneville*, the Tribunal held that it did not have the power to conduct a separate hearing for the purpose of section 112, nor to require attendance or the production of documents for this purpose.<sup>83</sup>
- 8.13 Although NCAT's recent *Zonneville* decision may help clarify the application of section 112, NCAT's submission to this Review indicates that there is still some confusion about the section for some aggrieved parties. To address this, we recommend that section 112 be amended to clarify that applicants cannot bring proceedings under section 112. Rather, where NCAT is of the opinion, following an administrative review, that a report to the Minister is warranted, NCAT can refer the papers of a particular matter to the relevant Minister (or Information Commissioner as circumstances require).

#### **Recommendation 15**

Amend section 112 of the GIPA Act to:

- Clarify that applicants and other parties to an external review cannot bring proceedings under section 112
- Clarify that, at the completion of a matter, if NCAT considers it warranted, NCAT can refer the papers of that matter to the relevant Minister
- Provide that, in the event that the responsible Minister is already party to the main proceedings, NCAT can instead refer the matter to the Information Commissioner.

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81. See for example, *Shoebridge v The Office of the Minister for Police and Emergency Services* [2014] NSWCATAD 189 and *Saggers v Environment Protection Authority* [2014] NSWCATAD 37.

82. *Zonneville v NSW Department of Finance & Services* [2016] NSWCATAD 47 and *Zonneville v Department of Education and Communities* [2016] NSWCAT 49, pages 59 to 65.

83. *Zonneville v NSW Department of Finance & Services* [2016] NSWCATAD 47, paragraph 20.

## 9. Conclusive overriding public interest against disclosure and excluded information

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- 9.1 Currently, Schedule 1 to the GIPA Act sets out the only information for which there is a conclusive presumption of overriding public interest against disclosure. This means agencies can refuse access to information that falls within any of the categories listed in Schedule 1.

### Documents containing factual material

- 9.2 With respect to section 14 (discussed above at 3.8), clause 2(1) of Schedule 1 of the GIPA Act provides that it is conclusively presumed that there is an overriding public interest against disclosure of Cabinet information. Clause 2(4), however, provides that information is *not* Cabinet information to the extent that it consists solely of factual material (unless it would reveal or tend to reveal information concerning any Cabinet decision or determination, or a position a Minister has taken, is taking or will take on a matter in Cabinet).<sup>84</sup>

- 9.3 Cabinet documents usually include at least some ‘factual information’ as well as policy analysis and advice. The Department of the Premier and Cabinet (DPC) submitted that it has sometimes been suggested that clause 2(4) could require agencies to ‘meticulously assess what information in the [Cabinet] document could be characterised as merely “factual material” and, to that extent, provide such information’ DPC submitted that:

requiring an agency to undertake such a word-by-word, sentence-by-sentence approach would appear to be unreasonable and do little to further the policy objectives of the GIPA Act in circumstances where, given the applicant is requesting access to a Cabinet document and therefore [is] presumably not interested in only receiving (and being charged a significant processing fee for having identified) ‘solely... factual information’ that might happen to be contained in the Cabinet document.

- 9.4 DPC submitted that the purpose of clause 2(4) of Schedule 1 is to ensure that documents that consist solely of factual material are not immune from disclosure as a result of the operation of clause 2(1) of Schedule 1 merely because they have been submitted to or otherwise form part of a Cabinet deliberation. This exclusion was carried over from the old FOI Act (which applied to ‘documents’ rather than ‘information’). The Review recommends that clause 2(4) of the GIPA Act be amended to clarify that ‘information’ is not Cabinet information to the extent that ‘it is contained *in a document* that consists solely of factual material.’ This will also make clause 2(4) consistent with clauses 2(1)-(3), which discusses ‘information’ and ‘Cabinet information’ in the context of ‘documents’. The recommended amendment will have the effect that documents that only contain factual information – the disclosure of which would not undermine collective Ministerial responsibility – are not immune from disclosure simply because they fall within a class of documents otherwise protected by clause 2(1) of Schedule 1.

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84. *Government Information (Public Access) Act 2009*, clause 2(4) of Schedule 1.

## Recommendation 16

Amend clause 2(4) of Schedule 1 to the GIPA Act to clarify that information is not 'Cabinet information' to the extent that it is contained in a document that consists solely of factual material.

### Documents affecting law enforcement and public safety

- 9.5 A number of agencies involved in law enforcement in NSW proposed that clause 7 ('Documents affecting law enforcement and public safety') of Schedule 1 to the GIPA Act should be expanded to expressly include documents affecting law enforcement and public safety that have been created by law enforcement agencies of other jurisdictions and shared with NSW.
- 9.6 Section 14(1) and clause 7 of Schedule 1 to the GIPA Act provide that it is to be conclusively presumed that there is an overriding public interest against the disclosure of documents affecting law enforcement and public safety that are created by NSW law enforcement agencies. However, the current wording of section 14 and clause 7 of Schedule 1 is to the effect that there is *not* a conclusive presumption that there is an overriding public interest against the disclosure of potentially sensitive or classified documents affecting law enforcement and public safety that are created by another jurisdiction's law enforcement agencies.
- 9.7 Some NSW agencies have expressed serious concerns that this anomaly may be discouraging the law enforcement agencies of other jurisdictions, including the Commonwealth, from sharing essential information relating to law enforcement and public safety with NSW. NSW's capacity to respond to terrorist and serious crime threats relies on the exchange of information and intelligence with agencies across jurisdictions, however, so it is important that any impediment to information exchange be suitably addressed.
- 9.8 There is a strong public interest in ensuring other governments' agencies feel reassured that sensitive information shared with NSW will not be released. It is in the interest of the NSW community as a whole that NSW be able to fully participate in, and benefit from, inter-jurisdictional law enforcement efforts, and be able to receive and use the intelligence of jurisdictional counterparts. For these reasons, we recommend that clause 7 of Schedule 1 be amended to provide that it also applies to documents affecting law enforcement and public safety that are created by specific corresponding law enforcement agencies in other jurisdictions and shared with NSW. This amendment will ensure that partner agencies in other jurisdictions maintain confidence to share this information with NSW. Noting the wide range of other jurisdictions agencies that may be affected, we have not attempted to list all relevant agencies at this stage. Instead, we consider that this would be more appropriate to do in consultation during the drafting stage of any relevant amendment.
- 9.9 We do not consider that this amendment will result in any tangible decrease in the amount of government information being disclosed in NSW for two reasons. Firstly, as discussed above, it may be that sensitive or confidential information created by other jurisdictions is not being shared with NSW at present due to the Act's current provisions, with the effect that that it is not, in any event, available in NSW to be accessed under the GIPA Act. Secondly, the disclosure of any information created by other jurisdictions and shared with NSW that is highly sensitive and relevant to

law enforcement and public safety would, in many cases, be appropriately refused with reference to the (non-conclusive) public interest considerations against disclosure listed in the section 14 Table.

#### **Recommendation 17**

Amend clause 7 of Schedule 1 to the GIPA Act to provide that the clause also applies to relevant documents affecting law enforcement and public safety that are created by corresponding law enforcement agencies in other Australian jurisdictions.

### **Documents relating to functions of the Privacy Commissioner**

- 9.10 Schedule 2 to the GIPA Act provides an exhaustive list of information that is deemed 'excluded information' of an agency for the purposes of clause 6 of Schedule 1. This information is, effectively, subject to a conclusive overriding public interest against disclosure and cannot be applied for or released.
- 9.11 Clause 2 of Schedule 2 lists the 'complaints and investigations' information of a number of NSW bodies that is 'excluded information'. Also excluded is information relating to certain agencies' complaints resolution, audit, operational audit, reporting, corruption prevention, review, inspection, dispute resolution and inquiry functions.
- 9.12 Under clause 2 of Schedule 2, information associated with the Privacy Commissioner's 'complaint handling, investigative and reporting functions' is excluded information. In contrast, information associated with the complaint handling, investigative, reporting *and* review functions of the Information Commissioner is excluded information.
- 9.13 The Privacy Commissioner submitted that clause 2 of Schedule 2 should be amended so that information relating to *reviews* conducted by the Privacy Commissioner under the PPIP Act is also listed as excluded information, in the same way as information relating to the equivalent function of the Information Commissioner. Another stakeholder suggested that such an amendment was unnecessary, and that the 'reviews' undertaken by the Privacy Commissioner are not equivalent to the 'reviews' undertaken by the Information Commissioner.
- 9.14 We recognise that there are material differences in the types of reviews undertaken by the Privacy Commissioner under the PPIP Act, and by the Information Commissioner under the GIPA Act. In particular, the Privacy Commissioner's review function is primarily to make submissions to an internal review conducted by an agency, or to conduct an internal review on behalf of an agency, rather than to conduct a second-stage, external review like the Information Commissioner.
- 9.15 We consider that it is important to also acknowledge the material difference in the type of information involved in reviews under the PPIP Act and those conducted under the GIPA Act. Reviews under the PPIP Act will generally involve circumstances in which a person asserts that his or her privacy has been interfered with, and, therefore, his or her personal information. We consider that this information should be subject to a high level of protection from disclosure.
- 9.16 In order to maintain the integrity of reviews involving the Privacy Commissioner under the PPIP Act, and to respect and protect the privacy and personal information

of individuals, we consider that information associated with the Privacy Commissioner's review function should be added to the list of relevant functions under clause 2 of Schedule 2.

**Recommendation 18**

Amend clause 2 of Schedule 2 to the GIPA Act to include 'review' as one of the 'excluded information' functions of the Privacy Commissioner.

## 10. Other technical amendments

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- 10.1 In addition to the issues discussed in this Report, there are a number of amendments of ‘technical’ nature that the Review considers should be made to the GIPA Act and the GIIC Act to ensure that they operate as intended. A table setting out these recommended technical amendments is contained at Appendix A. These recommended technical amendments have not been discussed in detail above because they do not relate to the structure or purpose of either the GIPA Act or the GIIC Act and will not result in significant changes to either Act.

### **Recommendation 19**

Amend the GIPA Act and the GIIC Act to incorporate the technical amendments listed in Appendix A.



## 11. Conclusion

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- 11.1 The Department has concluded that the GIPA Act and the GIIC Act are generally well-supported, that the new pathways the GIPA Act has created to access government information are useful and effective, and that both Acts are operating efficiently. The objectives of both Acts remain valid, and their terms remain appropriate for securing those objectives.
- 11.2 Together, the GIPA Act and the GIIC Act were designed to foster change in the way NSW agencies made government information available to members of the public, and to contribute to a cultural shift in the way agencies and members of the public think about 'open government'. We conclude that they have been generally successful in both respects.
- 11.3 We have made a number of 'substantive' recommendations for amendment to the GIPA Act and the GIIC Act. These recommendations are designed to provide greater clarity about the operation of the Acts for both agencies and applicants. They seek to modernise some aspects of the Acts, reduce compliance burdens for agencies, promote consistency, and provide more certainty for applicants in how their applications will be handled.
- 11.4 We expect that these amendments, along with the technical amendments discussed in Appendix A, will ensure both Acts' provisions are best suited to the current environment, while still appropriate to meet the fundamental objectives of the Acts, principally, promoting open government.
- 11.5 The GIPA Act and the GIIC Act will remain under review and will be considered further in examinations of the wider NSW information management landscape. Further work will also be undertaken to ensure the investigative, enforcement and reporting provisions of the Acts are fit for purpose, as previously discussed in this document.

## Appendix A – Technical Recommendations

	Recommendation	Rationale
1	Review and update the names of agencies referred to in the GIPA Act and, in particular, in Schedules 1, 2 and 3 of the Act.	This update will make the GIPA Act consistent with current agency names and machinery of government changes.
2	Add a note to the definition of 'government information' provided in section 4 of the GIPA Act, referring to the definition of 'record' in cl 10, Schedule 4. Alternatively (to the same effect), insert a definition of 'record' into section 4 of the GIPA Act.	Section 4(1) of the Act states that 'government information means information contained in a record held by an agency'. 'Record' is defined in cl 10 of Schedule 4 to the Act. Adding a note to the section 4(1) referring to the definition of 'record' in cl 10 of Schedule 4 to the Act, or moving the definition of 'record' into section 4 of the Act, would make the legislation easier to navigate and more accessible.
3	With respect to applications to access personal information (per sections 9 and 12 of the GIPA Act), agencies should have discretion to require an applicant to establish his or her identity prior to processing (that is, confirm that he or she is the person referred to in the personal information).  This discretion should be applied flexibly for vulnerable clients such as young people, people who have previously spent time in out-of-home care, homeless people or Aboriginal people who may not have sufficient identification. We would discourage agencies mandating a particular form of identification, or number of identity 'points' to be provided in recognition of the difficulties particular people may have in obtaining sufficient identification.	Agencies have legal responsibilities to protect the disclosure of personal information in accordance with the PPIP Act. In some cases, agencies may need to confirm that an applicant is who he or she purports to be before providing access to personal information. This is of particular concern for agencies that hold a significant amount of sensitive personal and health information.  This amendment will clarify that agencies can request confirmation of an applicant's identity when processing applications for personal information. We do not intend for agencies to exercise this in a rigid fashion, however, which may preclude some applicants from accessing personal information that is indeed their own, contrary to the intent of the GIPA Act.
4	Amend section 27 of the GIPA Act to clarify that class 1 contracts are disclosable when they have (or are likely to have) a value of over \$150,000 including GST	Agencies have expressed concerns that the current drafting of section 27 is unclear as to whether the threshold amount for disclosure includes or excludes GST.
5	Amend section 41 of the GIPA Act to require applicants to disclose in an application whether they have applied previously or concurrently to another agency for the same information and, if they have, to which agency	This amendment will encourage inter-agency consultation, assist agencies to decide whether to transfer an application (either in full or in part) and allow agencies to consider whether they could refuse to deal with an application because the applicant has already been provided with access to the information (under section 60(1)(b1)).
6	Amend section 43(2) to provide that a decision that an application that is not valid to the extent that it is made in contravention of section 43 is not a reviewable decision for the purposes of section 52(3) and Part 5.	Section 41 provides the conditions of a 'valid' access application. Section 52(3) states that an agency must provide assistance, so far as it would be reasonable, to assist an applicant to provide such information as may be necessary to enable the applicant to make a valid application. Section 80 provides that a decision that an application is not valid is a reviewable decision for the purposes of Part 5.  Amending section 43(1) as recommended will reflect that: <ul style="list-style-type: none"> <li>- access to excluded information will not be granted, regardless of whether the application is otherwise valid for the purposes of section 41;</li> <li>- agencies cannot 'assist' applicants to make applications for excluded information valid (per section 43(1))</li> <li>- a decision that an application for excluded information is invalid will not be reversed if subjected to internal or external review.</li> </ul>
7	Add notes cross-referencing: <ul style="list-style-type: none"> <li>▪ sections 51(3) and 56(3) of the GIPA Act, which both deal with</li> </ul>	As the provisions deal with similar subject matter, adding a note cross-referencing the provisions would make the legislation easier to

	<p>acknowledgement of receipt of an application by agencies and, separately,</p> <ul style="list-style-type: none"> <li>▪ sections 60(1)(d) and 79(1) of the GIPA Act, which both deal with information that is the subject of a subpoena</li> </ul>	navigate and more accessible.
8	Replace 'will' in subsection 54(2A)(a) of the GIPA Act with 'is likely to be.'	Section 54(2A) of the GIPA Act states that an agency is required to notify a person if information is likely to be included in a disclosure log. Section 54(2A)(a) then states that 'information will be included'. This is internally inconsistent. We propose the same terminology be used in the sub-section as the main section.
9	Amend section 56(2) of the GIPA Act to refer to 'research, or the compilation or analysis of statistics, in the public interest' (rather than 'research' only). This will align the GIPA Act with the <i>Health Records and Information Privacy Act 2002 (the HRIP Act)</i> and PPIP Act.	This change will bring the definition into line with the provisions of the PPIP Act and HRIP Act dealing with research. This would assist with consistency and certainty.
10	<p>Amend section 59(1) of the GIPA Act to include additional circumstances in the list of circumstances where an agency can refuse an application because the requested information is already available to the applicant. Some examples may be where the information:</p> <ul style="list-style-type: none"> <li>- has already been provided in an earlier GIPA Act application or court proceedings;</li> <li>- is known to already be in the 'actual possession' of the applicant (for example, it has been provided in earlier correspondence between the agency and the applicant);</li> <li>- is freely available on a public website; and</li> <li>- has been made available pursuant to Standing Order 52.</li> </ul>	This amendment would enable agencies to decide not to provide requested information as it is already available to the applicant. It would also allow an agency to decide the information is already available if it is freely available on a website maintained by the government. This would remove the requirement for the agency to process applications for this freely available information and therefore provide faster access at the lowest cost to the applicant and reduce resource pressures for agencies.
11	Remove the requirement in section 63 of the GIPA Act that an agency refund an application fee where the application has been transferred to a second agency that has made a late decision. An amendment can be made to section 48 of the GIPA Act.	The requirement for a refund in circumstances where the application has been transferred does not create an incentive for the agency receiving the transferred application to decide the matter within time. The requirement to provide a refund creates an administrative cost that may be greater than the value of the fee itself.
12	Insert a note after section 66 of the GIPA Act to clarify that 50% is the maximum entitlement to a discount of processing charges for an access application, even where both financial hardship and special public benefit considerations apply.	Submission received sought clarification on this issue. The note would be consistent with decisions by NCAT that 50% is the maximum reduction, even where both financial hardship and special public benefit considerations apply (see for example <i>National Tertiary Education Union v Southern Cross University [2015] NSWCATAD 151</i> ).
13	<p>Amend section 125 of the GIPA Act to clarify that the obligation of an agency to provide a copy of its annual report to the Information Commissioner arises after the relevant Minister has tabled the report in Parliament.</p> <p>Consequentially, amend section 37(1) of the GIIC Act to ensure that the Information Commissioner has sufficient time to receive agency's annual reports before being required to present a report on the operation of the GIPA Act to Parliament.</p>	<p>Under section 125(1) of the GIPA Act, agencies other than Ministers are required to prepare a report on their obligations under the Act and provide a copy to the Information Commissioner within 4 months of the end of each reporting year. Ministers are instead required to provide a report to the Minister responsible for the Act (the Attorney General).</p> <p>The Information Commissioner uses agencies' section 125 reports to prepare and publish a report on the operation of the GIPA Act, in accordance with section 37 of the GIIC Act. The Information Commissioner's report under section 37 of the GIIC Act is required to be published as soon as practicable after 30 June in each year.</p> <p>Agencies include the information they are required to report under the GIPA Act in their annual reports. As an agency's report is not a settled and public document until it has been tabled in Parliament, it is not appropriate for their reports to be provided to the Information Commissioner before they are finalised. Section 125 of the GIPA Act should be amended to clarify that agencies are not required to provide a report of their obligations under the GIPA Act to the Information Commissioner until after their annual report has been tabled in Parliament. Section 37 of the GIIC Act should also be</p>

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		amended to ensure that the Information Commissioner has sufficient time after receiving that information to prepare the report on the GIPA Act.
14	Amend Schedule 1 of the GIPA Act to add a conclusive presumption against disclosure in circumstances where a court has previously determined that, for reasons of privilege, a party has been refused access to the same information.	The submission from the Crown Solicitor's Office states that public interest balancing test would probably result in non-disclosure, however, courts' decisions should not be allowed to be 'reviewed' by administrative decision makers and a conclusive presumption should apply. Examples provided in submissions are that of public interest immunity, Sexual Assault Communication Privilege, as well as implied ability to only use documents in connection with litigation.
15	Expand the definition contained in clause 4(3)(b) of Schedule 4 of the GIPA Act to provide that personal information does not include an individual's name, title, agency or office, non-personal contact details and particular public functions.	There are significantly different views amongst agencies about the proactive release in generally available publications of the names of people engaged in the exercise of public functions. The amendment aims to clarify exactly what details of individuals in public office are exempt from the definition of personal information and can be released.
16	Clarify clause 12 of Schedule 4 to the GIPA Act to state that information is not held by an agency, if the information was unsolicited and is not relevant to the agency's business or functions.	This amendment would make GIPA Act consistent with section 4(5) of the PPIP Act, which deals with personal information 'held' by a public sector agency and the definition of 'state record' in section 3 of the <i>State Records Act 1998</i> .

## Appendix B – Conduct of the Review

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- B.1 Section 130 of the GIPA Act provides that the Minister is to review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- B.2 Specifically, the review is to consider the relationship between the GIPA Act and the PPIP Act. The review is also to consult with the Information Commissioner and the Privacy Commissioner and the Information Commissioner may assist with the review.
- B.3 Section 48 of the GIIC Act provides that the Minister is to review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. This report constitutes the review of both the GIPA and GIIC Acts, because the two Acts are so closely interrelated.
- B.4 The Department of Justice reviewed the GIPA Act and the GIIC Act on the Minister's behalf. An advertisement was published in newspapers on Wednesday 2 July 2014. Letters inviting submissions were sent to Ministers, government agencies (including the Office of the Department of Public Prosecutions, the Crown Solicitor's Office, Legal Aid and the Information and Privacy Commission) and other key stakeholders including the Law Society, the Bar Association, Community Legal Centres, media organisations, Universities, local government and human rights organisations. Submissions closed on 29 August 2014 but the Department accepted submissions out of time. Many stakeholders were offered the opportunity to update their submissions early in 2016.
- B.5 In total there were 80 submissions received (see a list of submissions at **Appendix C**). 74 per cent of submissions were received from government agencies and local councils.
- B.6 The Department carried out a literature review, considered numerous law reform reports from other jurisdictions<sup>85</sup> and analysed case law. The Department also drew upon the work of the NSW Ombudsman in 2009 in the report 'Opening Up Government'<sup>86</sup> as well as earlier work by the NSW Law Reform Commission.
- B.7 In early 2016, the Department carried out a number of face to face consultations. A roundtable forum was held for government agencies and all clusters were represented, as well as many smaller agencies. The Department also consulted with representatives of Universities and Local Councils, as well as with the NSW Civil and Administrative Tribunal. In May 2016, the Department held a community roundtable with attendance from community legal centres, media organisation, consultants and other interested parties.
- B.8 Over the course of the review, the Department consulted extensively with the Information Commissioner and the Privacy Commissioner, concluding in July 2017.

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85. Commonwealth of Australia, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010 (Cth)* (2013) (The Hawke Report), The FOI Independent Review Panel, *The Right to Information, Reviewing Queensland's Freedom of Information Act* (2008) (The Solomon Report).

86. NSW Ombudsman, 'Opening up Government – Review of the *Freedom of Information Act 1989*', February 2009.

The Department also drew heavily on the statistical data and analysis contained in the Information Commissioner's reports published in accordance with section 37 of the GIIC Act and other publications from the Information and Privacy Commission.

- B.9 The review revealed that to fully examine and understand the application and efficacy of the GIPA and the GIIC Acts, the broader NSW information management landscape requires examination holistically. The Acts will be considered further as work on information management progresses across government.

## Appendix C – List of submissions to the Review

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- C.1 Australian Property Institute (NSW Division)
- C.2 Blue Mountains City Council
- C.3 Carbone Council
- C.4 Cessnock City Council
- C.5 City of Canada Bay
- C.6 City of Canterbury
- C.7 City of Sydney
- C.8 City of Wagga Wagga
- C.9 Coffs Harbour City Council
- C.10 Confidential submission #1
- C.11 Confidential submission #2
- C.12 Confidential submission #3
- C.13 Confidential submission #4
- C.14 Confidential submission #5
- C.15 Confidential submission #6
- C.16 Confidential submission #7
- C.17 Crown Solicitor's Office
- C.18 Denys Clarke
- C.19 Department of Education and Communities
- C.20 Department of Family and Community Services (FACS)
- C.21 Department of Finance & Services – NSW ICT Advisory Panel
- C.22 Department of Planning and Environment
- C.23 Department of Premier and Cabinet (DPC)
- C.24 Dominic Wy Kanak
- C.25 Environment Protection Authority (EPA)
- C.26 Fire & Rescue NSW
- C.27 Forestry Corporation NSW

- C.28 Gerard Aguila
- C.29 Gosford City Council
- C.30 Holroyd City Council
- C.31 Hornsby Shire Council
- C.32 Information Commissioner
- C.33 Information Consultants Pty Ltd (Megan Carter)
- C.34 Justice Legal
- C.35 Land & Environment Court (LEC)
- C.36 Lane Cove Council
- C.37 Law Society of NSW Environmental Planning and Development Committee
- C.38 Legal Aid NSW
- C.39 Lismore City Council
- C.40 Lithgow City Council
- C.41 Local Government NSW
- C.42 Local Government Professional Australia NSW
- C.43 Manly Council
- C.44 Marrickville Legal Centre
- C.45 Minister for Local Government
- C.46 Mosman Council
- C.47 NSW Vice Chancellor's Committee
- C.48 NSW Civil and Administrative Tribunal (NCAT)
- C.49 NSW Electoral Commission
- C.50 NSW Ombudsman
- C.51 Office of the Director of Public Prosecutions (ODPP)
- C.52 Orange City Council
- C.53 Palerang Council
- C.54 Penrith City Council
- C.55 Peter Timmins



- C.56 Pittwater Council
- C.57 Port Stephens Council
- C.58 Privacy Commissioner
- C.59 Privacy Practitioner's Network
- C.60 Rachelle Louise
- C.61 Randwick City Council
- C.62 Right to Know
- C.63 Rockdale City Council
- C.64 Shellharbour City Council
- C.65 Shopfront Youth Legal Centre
- C.66 Singleton Council
- C.67 Southern Cross University
- C.68 Southern Sydney Regional Organisation of Councils
- C.69 State Records Authority of NSW
- C.70 State Water Corporation
- C.71 Tanya O'Dea
- C.72 The Hills Shire Council
- C.73 Trade and Investment NSW
- C.74 Transport for NSW (TfNSW)
- C.75 Treasury and Finance Cluster
- C.76 Tweed Shire Council
- C.77 University of Western Sydney
- C.78 Urbanseque Planning Pty Ltd – Eugene Sarich
- C.79 Wingecarribee Shire Council
- C.80 Wollondilly Shire Council