

The Shopfront

YOUTH LEGAL CENTRE

The Director
Justice Policy
Department of Justice
GPO Box 6
SYDNEY NSW 2001

27 August 2014

Dear Madam

Review of the Government Information (Public Access) Act 2009 (GIPA Act)

1 Introduction

We are writing to you in response to the review of the GIPA Act. We note that you are assessing whether the terms of the GIPA Act remain appropriate for securing the policy objectives of that Act, in particular the policy objective that the public has an enforceable right to access government information and that access is only restricted when there is an overriding public interest against disclosure.

We are concerned that many of our clients are having difficulty accessing their files from various government departments in a timely fashion or at all. They require these documents for support in relation to victims compensation applications, court matters, applications for housing and to access assistance from certain services including accommodation, mental health and substance abuse rehabilitation facilities. In addition, particularly for those who were children in the care of the state, these documents form part of their history and it is important and in the interests of justice to be able to access their records in a way that minimises distress.

The GIPA Act in its current form does not do enough, in our view, to adequately ensure that vulnerable young people can gain reasonable access to their personal information. In particular we consider that the GIPA Act should do more to ensure that the relevant areas of these government departments are adequately funded so that they can properly perform their duties and obligations under the Act.

2 About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. The Shopfront has been operating since 1993 and is a joint project of the law firm Herbert Smith Freehills, Mission Australia and the Salvation Army.

The Shopfront represents and advises young people on a range of legal issues, with a particular emphasis on criminal law. Most of the young people we assist as criminal defendants are also victims of abuse with unresolved trauma. We also assist our clients to pursue victims' compensation claims, in particular claims for domestic violence and sexual assault, which in the main relate to their history of child abuse.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to most of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic

violence or extreme family dysfunction. This leaves them extremely vulnerable and traumatised and unable to protect themselves. Moreover, most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem. These young people have difficulty successfully navigating the different bureaucracies related to housing, health care and income support, in addition to managing their legal issues.

3 General comments on the GIPA Act

Our primary concern is the fact that vulnerable young people are having difficulty accessing their own records from government departments due in part to the procedures and limitations set down in the GIPA Act.

Access to files from Department of Family and Community Services (FACS)

An important example of this is when young people attempt to access their files from the Department of Family and Community Services (FACS). They apply for them through the GIPA Act and pay the fee. However they are not provided with their files but instead receive a letter telling them that because their files are so voluminous it will either cost them thousands of dollars to have the files processed or worse, that their application is refused because provision of the files would be an *unreasonable and substantial diversion of the agency's resources* under s60 of the GIPA Act.

This distressing situation is further aggravated by the fact that many of these vulnerable young people were under the parental responsibility of the Minister during their childhood. Upon leaving care or even earlier, they receive letters telling them that their FACS files have been reviewed (often by third party lawyers) for amongst other things, claims against the State for abuse in care and also possible victims compensation claims. However they are not provided with copies of these files. Even though the files have been reviewed by a third party (who may be acting on the instructions of FACS and consequently could have a conflict of interest), the young person is told that they cannot have copies of those documents and that they need to apply for them through the GIPA Act. The young person then applies for their files through the GIPA Act and pays the fee. For a number of these young people, they are then asked to pay thousands of dollars or they have their applications refused as described above. We refer you to the case study of **Rebecca** set out in section 4 below.

We do note that in our experience at the Shopfront, the FACS Information Access Unit has tried to accommodate our concerns by providing for rolling applications to be lodged on behalf of our clients. Whilst we are grateful and appreciate this gesture, we note that this generous offer is not part of the legislative framework and in fact s60(3) of the GIPA Act provides that a government agency can refuse to do this. In addition, this process of rolling applications means that it takes about 12-18 months or longer for our clients to receive the total amount of their files.

We concede that young people who were formerly under the parental responsibility of the Minister can apply for their files through s168 of the *Children and Young Persons (Care and Protection) Act 1998*, but these applications can take several years as there are lengthy waiting lists and no legislative time limits. Although there is provision to provide specific or limited numbers of documents in a more timely manner, this is often not possible for clients who have been in long-term care, sometimes for many years. They are simply unable to identify with precision, particular time frames or specific incidents.

Therefore, the end result is that the most vulnerable members of society are not being provided with reasonable access to their own information, even though there is no public interest against disclosure.

4 Specific comments on sections of the GIPA Act

s60(1)(a) of the GIPA Act

"An agency may refuse to deal with an access application (in whole or in part) for any of the following reasons (and for no other reason):

(a) dealing with the application would require an unreasonable and substantial diversion of the agency's resources"

The manner in which this section of the GIPA Act is applied is causing great hardship to some of our most vulnerable young people and in our submission, completely defeats the policy objectives of the GIPA Act and indeed the spirit of the Act. The practical effect of this section is that a vulnerable, young person who was taken into care at a young age, suffered multiple foster placements and possible abuse in care, will have his/her application rejected on the basis that his/her files are too voluminous. Consequently, a young person who has suffered years of abuse and potentially has many claims is disadvantaged even further due to horrible circumstances which were beyond his/her control.

Case study – Rebecca

Rebecca was placed in the parental responsibility of the Minister in 2009 as a result of violence in the family home. Since 2009, FACS recorded that she was the victim of multiple counts of physical and sexual abuse by different perpetrators. When she left care just recently, she had 20 volumes of FACS files. She became aware of a letter from a lawyer, whom she had never met, addressed to FACS, stating that they had reviewed 20 volumes of her FACS files and that she had possible victims compensation claims. When she asked for copies of those files, her request was refused and she was told that she must apply for them through the GIPA Act. Legal Aid assisted her to make the application.

She received a response from FACS telling her that her files were too voluminous and that they would take more than 40 hours processing (NB 40 hours processing is only 640 pages which is not a lot when one considers that most FACS files consist of between 300 and 400 pages). The letter then stated that "Applications that require more than 40 hours of processing are considered to constitute an unreasonable diversion of agencies [sic] resources to complete. In accordance with the provisions established at Section 60(1)(a) I consider that to continue with your application in its current form would constitute and unreasonable diversion of resources."

It was suggested that if she could narrow the scope of her application, they may be able to assist her. However, it was not possible for her to do this and receive proper legal advice and assistance.

As discussed above, FACS Information Access Unit has tried to accommodate our concerns by providing for rolling applications to be lodged on behalf of our clients, even though s60(3) of the GIPA Act provides that a government agency can refuse to do this:

"In deciding whether dealing with an application would require an unreasonable and substantial diversion of an agency's resources, the agency is entitled to consider 2 or more applications (including any previous application) as the one application if the agency determines that the applications are related and are made by the same applicant or by persons who are acting in concert in connection with those applications".

Our clients' access to their documents is therefore currently at the mercy of the goodwill of FACS Information Access unit and of course, subject to any potential policy changes of that Department in the future. Using rolling applications also means that it takes many

months for our clients to receive their files. In our submission, this is not an acceptable situation.

In our submission, it is vital that people who are clients of (or who are otherwise under the supervision or care of) government agencies should be able to receive their **personal** information in a timely and inexpensive manner.

We suggest that the following measures could be taken to resolve these problems:

1. That the GIPA Act be amended to provide that all government agencies must allocate adequate resources to their information access units so that they can properly provide personal information to all applicants.
2. That the GIPA Act be amended to provide that s60 does not apply to applications for personal information by clients of government agencies (or persons who have been under the supervision or care of such agencies). These applicants would therefore be entitled to receive all of their documents in a timely fashion, regardless of the volume of documents.
3. Alternatively, that a special category of applicants be created, namely where the applicant is seeking access to their personal information and is a child (or was a child at the relevant time).

Schedule 1, Clause 10 of the GIPA Act

This is part of a list of information which is presumed to be excluded on the basis of an overriding public interest against disclosure. It provides that:

"It is to be conclusively presumed that there is an overriding public interest against disclosure of information contained in a report to which section 29 of the Children and Young Persons (Care and Protection) Act 1998 applies".

Section 29 of the *Children and Young Persons (Care and Protection) Act 1998* provides protection for people who report child abuse and we of course support this protection. However, the exemption is being applied in a manner that produces absurd results and prohibits our clients from accessing their files. Instead of redacting the names or identifying sections of reports, it has been determined that certain categories of documents such as initial assessments and even secondary assessments are to be excluded from the information provided. This has meant that even clients with many "child at risk" reports were receiving effectively meaningless documents, if any.

Case study - Ben

Ben was a young adult who was facing a possible sentence of imprisonment for a criminal matter. He disclosed to his solicitor that during his entire childhood, he had been subjected to physical abuse and this had severely impacted his development and circumstances. He said that FACS had been notified of this abuse many times. We therefore applied for his FACS files. Out of a total of 81 pages, we were provided with only 3 pages and these had been redacted. The pages that had been excluded consisted mainly of Initial Assessment Reports which would have greatly assisted Ben's case. Whilst we understood that the reports of the initial contact should be excluded, we requested copies of the Initial Assessment reports with any identifying details redacted. This was refused. Not only was this detrimental to Ben's sentencing matter, in our submission, it fundamentally undermines the policy objectives of the GIPA Act. Ben's history of what happened to him was effectively kept from him, despite him having an enforceable right to the information.

Section 29 of the *Children and Young Persons (Care and Protection) Act 1998* provides a list of types of proceedings where this protection does not apply. It would be a simple matter to amend Schedule 1 Clause 10 or indeed this section to include at the very least, any proceedings related to claims under the *Victims Rights and Support Act 2013*. In

addition, clear guidelines would be useful as to the types of information specifically required to be protected.

5 Conclusion

We consider that the failure to provide personal information files in their entirety (or as near as possible) to vulnerable people in a timely and inexpensive manner is not just inconsistent with the policy objectives of the GIPA Act but also offends the common objective of a fair and just society.

In our submission, it is vital that people who are clients of (or who are otherwise under the supervision or care of) government agencies should be able to receive their **personal** information in a timely and inexpensive manner.

The proposals outlined in section 4 of this letter would, in our submission, assist towards resolution of these problems.

Yours faithfully



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