



information
and privacy
commission
new south wales

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Mr Andrew Tink AM
Review of Police Oversight
Locked Bag 5111
PARRAMATTA NSW 2124

By email: policeoversightreview@justice.nsw.gov.au

Dear Mr Tink,

Submission to the Review of Police Oversight

I write to you in relation to your letter of 22 May 2015, in which you invited a submission to a Review into police oversight that you are conducting.

I understand that you have been tasked with considering and reporting to the NSW Government on options for a single civilian oversight model for police in NSW and appreciate the opportunity to contribute to the Review.

I note that the establishment of any oversight agency should reflect their roles and functions. In some instances, these roles and functions may be diverse.

My response ranges across a number of areas in the terms of reference and is made in the context of the *Government Information (Public Access) Act 2009* (the GIPA Act) and the *Government Information (Information Commissioner) Act 2009* (the GIIC Act), my experience as NSW Information Commissioner within that legal framework, and the role of the Information Commissioner as an independent statutory officer holder and Chief Executive Officer (CEO) of the NSW Information and Privacy Commission (IPC), an integrated oversight agency. I conclude with some general observations about regulatory oversight systems and achieving good regulatory outcomes.

Role of GIPA Act in accountability and oversight

NSW citizens expect open, transparent and accountable government decision-making. The second reading speech for the GIPA Bill and the GIIC Act outlined Parliament's legislative intent for the GIPA Act to be a tool for open government, supported by the Information Commissioner as a champion of open government. The GIPA Act's objects are to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective.

The GIPA framework is based on principles of proactive disclosure, an explicit presumption in favour of public disclosure of information, and a public interest decision-making test. The GIPA Act provides four pathways of information access and disclosure, which NSW public sector agencies are required to use to disclose government information.

Exclusions from the GIPA Act relevant to police oversight

Several of the agencies that are noted in the Review's Terms of Reference have exclusions under the GIPA Act.

- Under Schedule 1 of the GIPA Act, there is a conclusive presumption against disclosure of information that is prohibited under the *Police Integrity Commission Act 1996*.

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- There is a conclusive presumption against disclosure in relation to the following secrecy laws (Schedule 1, GIPA Act):

Police Act 1990—section 169A (Identity of complainant not to be disclosed)

Police Regulation 2008—clause 53 (Secrecy as to complaints about conduct)

- The following conclusive exclusions apply in relation to complaints handling and investigative information for these offices (Schedule 2, GIPA Act):
 - The office of Ombudsman—complaint handling, investigative and reporting functions (including any functions of the Ombudsman under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*).
 - The Police Integrity Commission—corruption prevention, complaint handling, investigative and reporting functions.
 - The office of Inspector of the Police Integrity Commission—operational auditing, complaint handling, investigative and reporting functions.
 - The New South Wales Crime Commission—investigative and reporting functions.

These exclusions are strictly prescribed in the GIPA Act and, in general agencies are required to apply a public interest test on a case by case basis. It is my view that these exclusions should be kept to a minimum consistent with the objects of the GIPA Act and Parliament's legislative intent for the GIPA Act to promote open government.

Lastly, I note that the GIPA Act provides members of the public with the right to seek review of agencies' decisions in the NSW Civil and Administrative Tribunal.

Experience in administering the GIPA Act in relation to police

Parliament's intention was for the Information Commissioner to be a champion of open government. The Information Commissioner is responsible for overseeing the operation of the GIPA Act, including monitoring agency compliance with the GIPA Act.

The GIPA Act encourages the 'proactive' release of government information, and provides the public with the ability to access information held by a government agency. This approach encourages accountability and transparency in the exercise by agencies and government of powers and discretion. An additional flow-on benefit is the promotion of public confidence in the decision-making of government agencies.

I have submitted annual statutory reports to Parliament on the operation of the GIPA Act. Based on the data that I have received for the 2013-14 report, I note that the NSW Police Force (NSWPF) received the largest number of formal applications for access to government information for the government sector (40% of all formal access applications that were reported to the IPC in 2013-14). Not-for-profit organisations or community groups accounted for the largest number of access applications for information to NSWPF, followed by legal representatives acting on behalf of members of the public.

I also receive requests for external reviews by the Information Commissioner of agencies' decisions in relation to formal access applications and complaints about agencies' conduct in relation to the GIPA Act. Since 2013, NSWPF has accounted for the largest number of requests for external reviews and largest number of complaints received by the IPC.

A foundation of a good regulatory approach is resolving as many issues as possible at the source, through transparent decision-making and communication, to ensure that as much as possible only matters of substance are escalated to more formal

bodies and processes. This could have positive impacts on the effective implementation of accountability mechanisms like the GIPA Act.

One of the IPC's tasks has been to assist agencies like the NSWPF to improve their internal processes while reducing the regulatory burden. For example:

- In June 2011, the previous Information Commissioner conducted a proactive investigation into the NSWPF's compliance with the GIPA Act. The investigation made recommendations and identified key areas for improvement, which NSWPF has or are implementing. The IPC is continuing to work with NSWPF on these issues.
- In 2014, the IPC authorised the NSWPF to implement an online tool for lodging formal access applications under the GIPA Act. Separately, the IPC has also developed a GIPA Tool for use by all agencies and has offered to make this tool available to the NSWPF.

The Review may wish to explore with NSWPF how mechanisms such as the GIPA Act are viewed internally and used.

Role of Information Commissioner as an independent statutory office holder

The Information Commissioner is an independent statutory officer that reports directly to Parliament. The Information Commissioner is overseen by the Parliamentary Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission (the Parliamentary Committee). This independence enables me as Information Commissioner to assist agencies, and to consider, review and investigate agency conduct in an objective, transparent and arms-length manner.

If this assists the Review, I attach a list of the specific functions of the Information Commissioner as set out in the GIPA Act and GIIC Act (**Attachment A**).

The Information and Privacy Commission

The IPC is an independent agency established under the *Government Sector Employment Act 2013* (the GSE Act). The Information Commissioner is recognised under the GSE Act as the agency head and performs all CEO functions.

The intent of Parliament was to create a single office while the roles of the Information Commissioner and Privacy Commissioner remained functionally independent. Parliament's intent was to provide a single point of service in respect to information access and privacy rights delivery. This has involved ensuring that agencies and individuals can access consistent information, guidance and coordinated training about information access and privacy matters.

Another structure that is relevant to the integrated model of the IPC and which the Review may wish to note is the NSW Information and Privacy Advisory Committee (IPAC). IPAC was established by statute in 2013 to provide advice to the Information Commissioner and Privacy Commissioner on information access and privacy matters. The Attorney General also has the capacity to refer issues to the Committee. Members of IPAC are appointed by the Governor and come from within and outside the public sector.

General observations about regulatory oversight systems

As Information Commissioner, I am focused on continuously improving the IPC's approach to achieving good regulatory outcomes. I have found the Commonwealth's *Regulator Performance Framework* and a 2014 OECD report, *The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy*, particularly useful in informing my reflections on improving regulatory outcomes. Some of the findings which may be of interest are:

- A common, structured performance reporting framework could help to increase transparency and accountability by providing a consistent approach for regulators to report objectively on the compliance outcomes of their regulatory efforts.

The Commonwealth's *Regulator Performance Framework* provides a structured approach to assess regulator performance and engagement with stakeholders. In particular, the Framework is flexible enough to enable regulators to reflect the differences in their size, risk profile and operating environments. A key question that the Framework asks is whether there should be consistency across regulators that are in the same portfolio or operating in the same market.

- There are benefits to the alignment of regulatory efforts with improved compliance outcomes. A structured reporting framework could be useful for oversight bodies, such as the Parliamentary Committee, to review the performance of the regulators that report to it. It could be used to measure cultural change within a regulator. It could also assist with understanding the relationship between regulators and regulated entities, the performance of regulated entities in complying with regulation and what could be improved.
- In evaluating the performance of a regulatory authority, the OECD notes that the governance arrangements of a regulator are critical, in particular, the legal remit, the powers it is given, how it is funded and how it is held accountable. These factors influence the effectiveness of regulatory outcomes.
- Robust external governance is important to hold regulatory bodies to account, particularly in evaluating whether a body is found to uphold a high standard of integrity and trust. For example, robust external governance could have a strong influence on the strategic direction and oversight of regulatory decisions. The OECD notes that better internal governance could also be an effective complement to, or in some cases a substitute for, improvements to external arrangements. Determining whether external or internal governance should be improved is dependent on a number of factors, such as regulatory objectives and the cost effectiveness of change.
- The social, economic and environmental issues faced by the community are complex and diverse. This diversity and complexity can and does appropriately inform the nature of and reason for the creation of different regulatory bodies. It would also be appropriate for this diversity to be reflected in the purposes, functions, capacities and levels of authority of regulatory bodies. What is critical is that there is a clear statement and understanding of the objectives and functions of the regulatory body that serve clearly identified policy goals.
- Diversity can have benefits for regulatory decision-making and outcomes. Different regulatory bodies will bring different levels of wisdom, experience and expertise to inform decision making. This is informed by the legislation that the regulatory body administers or is subject to. Diversity can minimise the risks that arise from reliance on a single decision-making body.
- Achieving good regulatory outcomes relies on building effective cooperative efforts, between agencies and regulatory agencies, and amongst regulators.

The IPC has taken forward this principle in its operations, including establishing cooperative arrangements with other oversight agencies. For example, the Information Commissioner has signed agreements with other oversight agencies to allow for co-ordination of complaint handling, such as with the NSW Ombudsman.

This kind of cooperation can help to reduce overlap, duplication and regulatory burden. Cooperation can also help develop a consistent, user-friendly and fair approach to the oversight of NSW government agencies like the NSWPF, for the

benefit of the public. Such processes should be an important continuing part of oversight arrangements.

- The establishment of independent regulatory bodies provides strong benefits, including providing public confidence that the decisions are objective, impartial and made with integrity. The maintenance of independence should be considered in terms of actual and perceived independence of the regulatory body.

When the office of the Information Commissioner was developed in 2009, Parliament decided to establish an independent new office (rather than establish the role in the Ombudsman's Office) to give greater prominence and emphasis to the role of the Commissioner, and to give the Commissioner greater scope to act as the champion of open government. This separation has enabled the Information Commissioner to more effectively fulfill Parliament's intent.

The creation of the IPC in 2011 as an integrated agency and its establishment under the GSE Act as an independent agency, with the Information Commissioner as the agency head and CEO, further fulfills Parliament's intent to provide a one-stop shop for the people of NSW in matters involving access to government information, privacy and personal information.

Lastly, I would appreciate being informed of any potential changes to the Parliamentary Committee that the Review may consider making.

I agree to this letter being published, should the Committee decide to publish submissions. Please ensure that prior to publication of this letter that my signature is redacted from the version to be published.

Please do not hesitate to contact me if you have any queries. Alternatively, your officers may contact David Marcus, Manager Performance Reporting and Projects, on (02) 8071 7041, or by email at david.marcus@ipc.nsw.gov.au.

Yours sincerely

~~Ms Elizabeth Tydd~~
~~CEO, NSW Information Commissioner~~

Attachment A

To provide the Review with an example of the functions and powers of another oversight model, the following list outlines the specific functions of the Information Commissioner as set out in the GIPA Act and the GIIC Act:

- promote public awareness and understanding of this Act and to promote the object of this Act (that is, open government)
- provide information, advice, assistance and training to agencies and the public on any matters relevant to this Act
- assist agencies in connection with the exercise of their functions under this Act, including by providing services to assist with the lodgment, handling and processing of access applications
- power to receive and deal with a complaint about the conduct (including action or inaction) of an agency in the exercise of functions under the GIPA Act
- conduct an external review of agency decisions in relation to decision to refuse formal access applications
- investigate agency systems, policies and practices, including power to issue a report and to conduct formal inquiries; this includes the inquiry powers of a Royal commission
- monitor, audit and report on the exercise by agencies of their functions under, and compliance with, this Act
- issue guidelines and other publications for assistance of agencies and the public
- make reports and provide recommendations to the Attorney General about proposals for legislative and administrative changes to further the object of this Act
- report to NSW Parliament on the operation of the GIPA Act.

In addition, the Information Commissioner can receive public interest disclosures from public officials under section 12D of the *Public Interest Disclosures Act 1994*. A disclosure by a public official to the Information Commissioner must be made in accordance with the GIIC Act, and be disclosure of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show that a public authority or another public official has engaged, is engaged or proposes to engage in government information contravention. The Information Commissioner would deal with the complaint in accordance with her complaint handling functions under the GIIC Act.