

19 December 2014

Attn: Mr Stephen Bray
Senior Policy Officer, Justice Policy
Department of Justice
10 Spring St
SYDNEY NSW 2000
By email: Stephen_bray@agd.nsw.gov.au

Dear Mr Bray,

We write to provide a submission to the NSW Attorney General for the review of the of the *Government Information (Public Access) Act 2009* (the GIPA Act).

The media organisations that are parties to this submission are AAP, APN News & Media, ASTRA, Bauer Media, Commercial Radio Australia, Fairfax Media, Free TV, MEAA, News Corp Australia, The Newspaper Works and West Australian Newspapers (the Media Organisations).

We welcome to the opportunity to provide a submission to the review of the GIPA Act and accept the NSW Government's invitation to engage in further consultation in the first quarter of 2015 following initial analysis of submissions and identification of the key issues.

As the Attorney General is aware, the media plays a crucial role in a democracy in accessing, analysing and disseminating information about issues and events which affect our community. Media organisations and journalists have a particular concern in the proper and efficient administration of the information access laws. Open and transparent government is critical to democracy and should not be constrained for the protection of political interests. This year's revelations in NSW underpin the importance of an effective GIPA regime.

This submission raises a number of issues important to improving the GIPA Act and a more detailed submission will be provided at the next stage of consultation.

Costs and charges

Costs and charges remain one of the major constraints to the media's effective use of the GIPA Act.

The Solomon Report into Queensland's then FOI Act noted that the United States FOI model recognised the value of access information where no charges apply to information released in the public interest because it is *'likely to contribute significantly to public understanding of the operations or activities of the government.'*¹

The 1990 Electoral and Administrative Review Commission (EARC) Report (Queensland) noted that *'access to information as to what decision are made by government and the content of those decisions, are fundamental democratic rights. As such, FOI is not a utility, such as electricity or water, which can be charged according to the amount used by individual citizens.'*

The media organisations recommend two proposed changes regarding fees and charges:

- i. Similar to the Commonwealth FOI Act, all agencies should be required to accept applications

¹ http://www.rti.qld.gov.au/_data/assets/pdf_file/0019/107632/solomon-report.pdf, p195

online and there should be no application fee for requests lodged by media. In addition, applicants should have the option of the provision of decisions and documents by email. This reform has proven to be among the most significant and important in improving access to the Commonwealth Act since it was adopted, and should be part of the GIPA Act.

- ii. Section 66 of the GIPA Act states: *'An applicant is entitled to a 50 per cent reduction in a processing charge imposed by an agency if the agency is satisfied that the information applied for is of special benefit to the public generally.'*

This section should be amended so an applicant can be entitled to a 100 per cent reduction in processing charges on the basis that release of the information is in the public interest. The term *'special benefit'* has proven to be difficult to define and too high a hurdle. Any information released under GIPA is information that was not going to be released by government as a matter of course. Therefore information released under GIPA plays a valuable role in informing the public about government, and should be available at less cost to applicants.

Power of the Information Commissioner to conduct reviews

Another issue requiring reform relates to the power of the Information Commissioner to conduct reviews (Section 89).

We note that, for example, under Section 92 of the GIPA Act *'the Information Commissioner may make such recommendations to the agency about the decision as the Information Commissioner thinks appropriate.'* Similarly, Section 92 provides *'the Information Commissioner may recommend that the agency reconsider the decision that is the subject of the Information Commissioner's review and make a new decision as if the decision reviewed had not been made.'*

This power for the NSW Information Commissioner to recommend can be contrasted to the existing power of the Office of the Australia Information Commissioner under the Commonwealth FOI Act. Under Section 55K of the Commonwealth Act, the Information Commissioner *'must make a decision in writing: (a) affirming the IC reviewable decision; or (b) varying the IC reviewable decision; or (c) setting aside the IC reviewable decision making a decision in substitution for that decision.'*

The media organisations recommend that the NSW Information Commissioner be empowered to make decisions affirming, varying or setting aside reviewable decision as well as being able to make new decisions. The failure to provide this power leaves agencies with the ability to ignore recommendations of NSW Information Commissioner, which we do not think is appropriate. Independent umpires cannot have credibility when they are unable to recommend a binding resolution.

Application of the Act

Any review of the GIPA Act must take into account revelations about politicians, donors and the political process. The NSW Independent Commission against Corruption has and continues to undertake a number of investigations involving events containing these elements. These events dictate that the extent of accountability, openness and transparency faced by the elected representatives of the NSW Parliament must be addressed by this review of the GIPA Act.

Issues like the application of the Act to the NSW Parliament and to electoral offices should be clarified and improved. Similarly, so-called 'party political' information, particularly involving donors

to a given party or politician, that can be exempted as unresponsive to a GIPA application on the basis that such information is not a government document, should be addressed.

This information should not be exempt from the GIPA Act. A strengthened GIPA Act in this area will ensure politicians perform their duty in the public interest.

The GIPA Act states, for example, under Schedule 1, Section 11, that *'it is conclusively presumed that there is an overriding public interest against disclosure of information the disclosure of which would disclose information contained in the Register of Interests kept by or on behalf of the Premier pursuant to the Code of Conduct for Ministers of the Crown adopted by Cabinet.'* Secrecy about the register of interests is unacceptable and, coupled with secrecy about the correspondence of ministers and other elected representatives about party political matters allows possible corruption. Indeed, any review should consider whether a public interest test should apply to Schedule 1, particularly when an application is supported by reasonable information of possible mismanagement or corruption.

Disclosure logs

Another issue requiring reform relates to Section 25 of the Act relating to disclosure logs.

The media organisations contend that information provided to an applicant should not be available on the disclosure log for 10 working days upon request of the applicant. Same day release discourages journalists from pursuing information through the GIPA process as that information would readily be publicly available (subject to the request being granted). Also, same day release may hinder journalists in accurate and fair reporting as complex documents are required to be turned around quickly without necessary analysis and checks with external sources and experts. We are able to provide a far more detailed submission, prepared for the OAIC, on this issue if required.

As we outlined previously in this submission, the media organisations appreciate the opportunity to make this contribution to the initial stage of the GIPA Act review. We look forward to participating in more detailed discussions in the next phases.

