



16 December 2016

Ms Rosalyn Bell  
Assistant Commissioner  
Productivity Commission

*By email to: [data.access@ipc.nsw.gov.au](mailto:data.access@ipc.nsw.gov.au)*

Dear Ms Bell

### **Comments on the Productivity Commission's Draft Report on *Data Availability and Use***

The purpose of this letter is to provide some detailed comments on the Productivity Commission's Draft Report on ***Data Availability and Use***. The NSW Government has also responded to the draft report and the comments below are supplementary to that response. They are intended to assist the Commission in finalising the report by providing additional contextual material and commentary.

#### **New South Wales information access laws**

FOI laws across Australian jurisdictions are compared in Table C.4 on page 471 of the draft report. Notably, the NSW legislation does not take an exemptions-based approach, but rather sets out a series of public interest considerations that agencies should apply when deciding whether to release government information.

In regard to recommendation 5.2 the *Government Information (Public Access) Act 2009* (GIPA Act) provides a framework for defining and assessing the public interest which includes consideration of factors against disclosure including the protection of privacy. This regime has matured in NSW and operates to effect and is reported upon annually by the Information Commissioner, Open Data Advocate. Alignment with this legislative framework would promote consistency and support the overall directions recommended.

All government agencies must disclose or release information unless there is an overriding public interest against disclosure. Rather than applying blanket exemptions or an exemption-based framework, decision-makers must weigh the factors in favour of disclosure against the public interest factors against disclosure. Unless there is an overriding public interest against disclosure, agencies must provide the information. The GIPA Act (at section 14) provides an exhaustive list of public interest considerations against disclosure. These are the only considerations against disclosure that agencies may consider in applying the public interest test. Considerations are grouped under the following headings:

- responsible and effective government
- law enforcement and security
- individual rights, judicial processes and natural justice
- business interests of agencies and other persons
- environment, culture, economy and general matters
- secrecy provisions (in legislation other than those listed in Schedule 1)
- exempt documents under interstate Freedom of Information legislation.

However, in certain situations information may be subject to a *conclusive* presumption of an overriding public interest against disclosure, for example cabinet information and information subject to legal professional privilege.

Alternatively, in a small number of cases, it may be information that cannot be validly requested through the formal access application process because it is excluded information under schedule 2 to the GIPA Act.

We therefore request that Table C.4 be amended to reflect this approach, either by amending the 'Exceptions' section to read 'Exceptions/public interest considerations' and/or replacing the 'x' in the NSW column with an asterisk, and a footnote reflecting the approach taken in NSW.

### **The GIPA Act provides a 'push' model for information release**

The draft report refers, on pages 97 and 121, to NSW's 'push' model for release of government information. Similarly, on page 470, the draft report mentions the proactive model that applies to releasing government information in NSW. The Commission may wish to note, associated with this requirement, the legislative provisions which support the 'push' model of information release. For example, the GIPA Act requires agencies to have a program for the proactive release of government information that is reviewed at least every 12 months. The Act also provides protections for persons who act in good faith for the purposes of executing the GIPA Act (s115) and thus supports a more active release-oriented culture.

Additionally, consistent with the NSW approach, the Commission may wish to amend the second dot point on page 319 of the draft report, to replace 'positive' with 'proactive.' This amended dot point would then read: "provides clear permission to take a proactive approach to release of data, subject to particular safeguards."

### **Implications of government purchases and contracting with the private sector for data release**

Pages 185 to 187 of the draft report consider situations where public sector organisations use data generated by, or held by the private sector.

Section 121 of the GIPA Act provides NSW government agencies with a mechanism to obtain access to certain information held by contractors when they provide services to the public on behalf of the government agency. The Act requires agencies to include in their contracts a provision that ensures the agency has an immediate right of access to information where it is:

- relating directly to the performance of services by the contractor
- collected by the contractor from members of the public to whom it provides, or offers to provide, the services, and
- received by the contractor from the agency to enable the contractor to provide the services.

Such information held by private sector contractors will then form part of the agency's 'government information'. This means that the provisions of the GIPA Act will apply to the information.

Some information is excluded from these mandatory contract requirements, for example if:

- the information would reveal the contractor's financing arrangements, financial modeling, cost structure or profit margins
- the contractor is prohibited from disclosing the information under any Australian law, or

- disclosure could place the contractor at a substantial commercial disadvantage in present or future dealings with the agency.

Recommendation 9.4 would align with existing legislation in NSW.

### **Definition of personal information within and across jurisdictions**

On page 443 of the report, in Box C.4 'Definitions of personal information', the report includes the definition found in schedule 4 to the GIPA Act and notes the variation in such definitions across jurisdictions.

In NSW, personal information is defined differently in the GIPA Act and the *Privacy and Personal Information Protection Act 1998 (NSW)* (PPIP Act). The definition of personal information in section 4 of the PPIP Act does not replicate that provided in the GIPA Act. Additionally there are some differences in the exemptions between the Acts, and, as the report notes, health information in NSW is regulated by the *Health Records and Information Privacy Act 2002 (NSW)* (HRIP Act).

Given the concerns identified in the draft report regarding perceived complexity with regard to privacy protections, the Commission may wish to address the benefits from greater consistency in definition of personal information.

In regard to recommendation 9.1 alignment with existing legislative definitions would support the promotion of Open Data.

### **Authorising Environment**

The provision of an express right to access information through authorising legislation is essential to the successful implementation of that right.

However, incorporation of a right to information within a legislative regime designed to restrict access to information, for example via amendments to privacy legislation (Commonwealth or State), would lead to a dilution of those rights through a conflict with legislative objectives. The legislative authorising environment is particularly relevant to the Commission's recommendations regarding legislative change including 9.1, 9.2, 9.4, 9.7 and 9.8.

Accordingly and in response to emerging and extant cultural and environmental factors it may be necessary to consider new definitions such as 'consumer data' to ensure that these new concepts receive appropriate legislative authority.

International experience in Open Government demonstrates that the existence of an express authorising environment is critical in promoting Open Government. The Commission may wish to consider research commissioned by the IPC and conducted by the University of Technology at Sydney, available at:

[http://www.ipc.nsw.gov.au/sites/default/files/file\\_manager/REPORT\\_Advancing\\_the\\_objects\\_%20of\\_the\\_GIPA\\_Act\\_2015.pdf](http://www.ipc.nsw.gov.au/sites/default/files/file_manager/REPORT_Advancing_the_objects_%20of_the_GIPA_Act_2015.pdf).

### **Establishment of the NSW Open Data Advocate**

The draft report notes in several places the establishment of the NSW Data Analytics Centre and the 'push' model embodied in the GIPA Act. The operational objectives of the NSW Data Analytics Centre align with the NSW Information Commissioner's statutory functions. In April 2016 the Information Commissioner was appointed as NSW Open Data Advocate with responsibility for encouraging the release of data by NSW government agencies in ways that are respectful of data sharing safeguards, through the provision of information, advice and assistance to agencies, underpinned by compliance with the GIPA Act.

In regard to recommendation 5.4 the Information Commissioner, as Open Data Advocate, has implemented a program of work to facilitate access to and promotion of Open Data.

The Information Commissioner, Open Data Advocate provides regular reports regarding proactive release of information and produces an annual report on the operation of all release mechanisms contained under the GIPA Act including the proactive release of information by all agencies within jurisdiction. The regulatory scope of the Information Commissioner extends to five sectors: NSW Government Agencies; State Owned Corporations; Ministers and their Offices; all NSW Local Councils and NSW Universities.

In regard to recommendation 2.1 data release is also supported under the GIPA Act which promotes mandatory proactive release; informal release and formal access applications to release information in response to an access application.

The legislation is technically neutral and accordingly facilitates the release of government data.

### **Recent NSW Information and Privacy Commission (IPC) initiatives on open data**

#### Explaining 'Open Data' – IPC Infographic

The draft report notes a number of barriers to open data including lack of understanding of its scope and benefits. To address this issue, in October 2016 the IPC produced an **Open Data Infographic**. The first of its kind in Australia, this new resource has been developed to assist the community in understanding 'open data' and what it means to them. The infographic provides users with a simple explanation of Open Data, how it can be used and the benefits derived from its use.

The rapid development in technological solutions is supporting de-identification. There is sufficient technical expertise to provide advice regarding systems capability to further the Commission's recommendations through a graduated approach.

The release of the NSW IPC Infographic in September 2016 provides an explanation of 'Open Data' to better support clarity and consistency for citizens and agencies. It also explains some of the processes available for ensuring data is eligible to be made 'open'. The infographic includes links to case studies of open data in action to service communities and is available at <http://www.ipc.nsw.gov.au/open-data-infographic>.

#### IPC Research

##### i) Open Data - legal, regulatory, policy and operational conditions

The draft report devotes significant attention to legal, policy and regulatory factors affecting the scope and impact of open data, and proposes a policy framework to foster openness and trust. The IPC has in progress research to identify international legal, policy and regulatory settings that enable Open Data and promote a culture of data sharing. The research project, conducted by the University of New South Wales, is intended to produce a practical reference paper to identify and consider the conditions and a description of the positive outcomes in Open Data application. The Open Data Barometer has been utilised to benchmark international best practice. The aim is to move from a focus on barriers to strategies to overcome those barriers, drawing on international best practice.

#### Community Attitudes Survey

This research is relevant to recommendations 9.11 and 9.2.

During 2016 the IPC conducted a community attitudes survey on accessing government information, with a special focus on open data. The survey found that:

- 89 per cent of respondents believe having the right to access government information is important; and
- more than 75 per cent of respondents agreed that de-identified information should be used to inform the planning and delivery of government services, and enhance collaboration with the public in the development of government agencies' policies.

The IPC's full survey results will be publicly released in our 2015/16 Report on the Operation of the GIPA Act, to be tabled in February 2017. The theme for the report is Open Government – Open Access – Open Data.

#### Agency information guides and public participation

As identified on page 470 of the draft report, the GIPA Act requires agencies to provide information about their structure and functions. This information is released in an Agency Information Guide.

Essential elements of Agency Information Guides are prescribed under the GIPA Act, and include information about:

- the structure and functions of agencies;
- the manner in which agencies exercise their public purpose functions, in particular their decision-making functions;
- the various kinds of information held by agencies;
- the mechanisms that enable members of the public to access this information; and
- the arrangements that are in place (if any) to enable members of the public to participate in the formulation of the agency's policy and the exercise of the agency's functions.

The Information Commissioner has committed to a collaborative program to assist agencies and the public to enhance the application of Agency Information Guides, strengthen compliance with the GIPA Act and promote arrangements for public participation through a NSW Charter for Public Participation  
[http://www.ipc.nsw.gov.au/sites/default/files/file\\_manager/IPC\\_Report\\_Towards\\_a\\_NSW\\_Charter\\_for%20Public\\_Participation\\_FINAL.pdf](http://www.ipc.nsw.gov.au/sites/default/files/file_manager/IPC_Report_Towards_a_NSW_Charter_for%20Public_Participation_FINAL.pdf)

#### **NSW coordinating input of State and Territory Information Commissioners/Ombudsmen to Australia's Open Government Partnership National Action Plan (OGP NAP)**

Australia's Open Government Partnership National Action Plan, tabled on 5 December 2016, demonstrates Australia's commitment to ensuring the effective operation of the right to information.

The NSW Information Commissioner leads the contribution of state and territory Information Commissioners/Ombudsmen to the Interim Working Group for Australia's NAP.

Independent state and territory and commonwealth Information Commissioners/Ombudsmen collectively submitted a proposal for inclusion in the NAP to align with the measures adopted by the World Justice Projects' Open Government Index. These measures are now incorporated in the NAP.

Measuring the effectiveness of right to information laws is essential to ascertaining how they are being accessed by citizens and the operation of these laws in practice.

The Productivity Commission Report identifies the requirement for the states and territories to work with the Commonwealth to achieve the objectives of data availability and reuse. Accordingly opportunities to promote state-based engagement may also provide greater insights and advance the agenda proposed by the Productivity Commission.

The benefits of collaboration between the Productivity Commission; the Interim Working Group and states and territories more broadly offers many significant advantages. In particular, the OGP NAP identifies three commitments to “Open data and digital transformation”. Commitment 2.2 expressly articulates:

*“We will develop an ongoing and collaborative conversation with the community to build trust about data sharing and integration.”*

As a result of the consultation process the OGP Interim Working Group has recognised that a singular focus on individual privacy may overshadow the other factors to be considered in relation to data management. These factors occupy of spectrum of information governance matters including sound records management; national security and cyber security. Accordingly a broader focus on information governance would better identify and manage risks and support the objective of building public trust.

At a sub-jurisdictional level many of these factors are addressed through state based legislation and, in the absence of collaboration harmonization of policy approaches may curtail or delay the reform envisaged by the Productivity Commission.

#### **Statutory review of the GIPA Act**

The Department of Justice is currently conducting a statutory review of the GIPA Act. The findings of the Productivity Commission will inform this review and assist in a coordinated approach across jurisdictions.

Please do not hesitate to contact David Marcus on (02) 8071 7041, or by email at david.marcus@ipc.nsw.gov.au, if you have any questions about this letter.

Yours sincerely



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