information and privacy commission new south wales

COMMITTEE ON THE OMBUDSMAN, THE LAW ENFORCEMENT CONDUCT COMMISSION AND THE CRIME COMMISSION

Thursday, 2 May 2024

2023 REVIEW OF ANNUAL AND OTHER REPORTS OF OVERSIGHTED BODIES

INFORMATION AND PRIVACY COMMISSION NSW
(Information Commissioner and Privacy Commissioner)

ANSWERS TO SUPPLEMENTARY QUESTIONS

QUESTION:

1. **You noted that the Commission's budget allocation should reflect what it costs to perform the independent statutory functions conferred on it (Transcript, p46). Do you have adequate resourcing to adapt when changes are made to the Commissioners' functions?**

   a. **Please comment on the adequacy of funding to establish and regulate the Mandatory Notification of Data Breach Scheme.**

ANSWER:

When an additional statutory function is contemplated for an integrity agency such as the Information and Privacy Commission (IPC), supplementary and ongoing budget funding is required. The IPC does not have a resourcing structure that enables it to adapt or reallocate funding in the event it is given an expanded statutory remit. The IPC cannot stop performing existing statutory functions in order to perform new ones. The IPC is a small agency with just over 30 staff to perform both its information access and privacy functions.

A recent example of the IPC being given additional functions is the new Mandatory Notification of Data Breach Scheme (MNDB). The MNDB scheme legislation conferred on the Privacy Commissioner the functions of oversight, investigation, monitoring and reporting for data breaches involving the NSW public sector. This scheme commenced on 28 November 2023 with the IPC having received short-term budget supplementation only.

In the last year, significant personal data breaches have affected public trust and confidence in the safeguarding of personal information. In the IPC's 2024 Community Attitudes Survey, 95% of respondents indicated data protection was quite important/very important to them. 31% indicated being affected by a data breach, an increase of 14% from 2022. Risks of and from future breaches by NSW agencies will be mitigated if the Privacy Commissioner can, in accordance with the new legislated scheme, monitor whether requirements for notification are being met, provide advice and

guidance to agencies, and report on data breaches, including the causes of notified breaches and any learnings and insights that may have been gained.

Since the IPC had only been given short-term budget funding to cover the commencement of the MNDB scheme, it submitted a request to the NSW Government for ongoing funding of $1.4 million from 2024/25 onwards. Ongoing funding for the IPC is essential for public confidence that data breaches in the NSW public sector will be managed effectively in accordance with legislation. In the absence of ongoing funding, the Privacy Commissioner would be unable to administer the MNDB Scheme as intended, resulting in important statutory functions being unable to be performed and the risks associated with data breaches not being mitigated – including that citizens may not be notified about data breaches and may be unable to take important steps to minimise the risks posed to them.

QUESTION:

2. Can you explain any changes being proposed to information laws to keep up with the use of automated decision-making in the public sector?

a. What hinders the Commission from introducing mandatory proactive disclosure of the use of artificial intelligence (AI)? (Transcript, p48)

ANSWER:

In October 2023, the IPC made a submission to the NSW Parliament's Inquiry into Artificial Intelligence in NSW. The IPC's submission referred to the AI Regulatory Scan, published by the IPC in October 2022, and re-iterated four recommendations for legislative change to protect the right of information access in a digital context.

These four recommendations are to:

- require the proactive disclosure of the use of AI by agencies as open access under the *Government Information (Public Access) 2009* (GIPA Act);
- ensure that open access information includes a statement of use, inputs and a description of the operation of the AI system;
- expand information access rights in relation to government contracted services to include provisions that require access to contract information held by suppliers about AI used by agencies to assist in their decision-making functions; and
- include the use of AI as a factor in favour of disclosure of information under the GIPA Act.

In addition, the submission recommended amendments to the GIPA Act to address the limitation in section 121, which requires agencies entering into contracts with private sector contractors to ensure that they have an immediate right to certain information, but only in circumstances where the contractor has been engaged to provide services to the public on behalf of the agency. Section 121 does not capture situations where a third-party contractor has been engaged to assist an agency with its decision-making, including through the use of AI or other automation, but is not engaged in service delivery to the public.

Section 6 of the GIPA Act provides that an agency must make the government information that is its 'open access information' publicly available, unless there is an overriding public interest against disclosure of the information. Section 18 of the GIPA Act and the *Government Information (Public Access) Regulation 2018* (the GIPA Regulation) specify what government information held by an agency is 'open access information'.

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The Information Commissioner does not have a statutory power to determine that new categories of information are mandatory 'open access information' for the purposes of the GIPA Act and Regulation. To ensure that all agencies take steps to increase transparency around the use of AI and automated decision-making, therefore, the Information Commissioner supports legislative amendments. The Information Commissioner has recently advised all agencies, however, that some information about their use of AI should be added to their Agency Information Guides. Agency Information Guides are required by section 20 of the GIPA Act and must describe the ways in which an agency's functions affect members of the public, in particular, its decision-making functions. The Information Commissioner is considering formalising this advice by issuing guidelines under section 22 of the GIPA Act.

QUESTION:

b. Does the Commission plan to work with other government agencies and offices to deal with the expected increase in AI-related problems and complaints?

ANSWER:

The IPC will continue to work with other government agencies, including other statutory officeholders, senior executives and public sector information and privacy practitioners, to improve practices relating to the use of AI and respond to any emerging problems.

The Information Commissioner also intends to explore further opportunities to continue collaboration with the NSW Ombudsman. The former Information Commissioner was a member of the Ombudsman's expert advisory group for their project to map the use of automated decision-making systems across the public sector. This remains an area of ongoing importance to both offices and further work could include exploring guidance in relation to automated decision-making or the use of emerging technologies in the public sector.

Currently, the IPC has an "Implementing Technology - Privacy Toolkit", containing resources to assist agencies when using, implementing and commissioning projects involving technology. The Privacy Commissioner is also considering opportunities for further guidance to assist agencies in relation to AI and privacy. The Information Commissioner is also considering issuing guidelines about the publication of information about agencies' use of AI.

The IPC will also continue to liaise with the NSW Government and this Committee to explain and support its proposals for legislative reform in this area, which it has made in its submissions to other inquiries and in reports published by the IPC. Once the impact on the IPC's activities arising from to AI-related complaints or problems can be assessed, additional resourcing may be needed to ensure any increased demand for agency stakeholder engagement or complaints-handling can be met.

QUESTION:

3. What actions do you take following a compliance audit to ensure improvement?

a. Do you monitor areas of concern following a compliance audit?

ANSWER:

The IPC monitors areas of concern following a compliance audit and publicly reports on agency or sector responses to identify opportunities for improvement and to elevate capability.

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IPC actions following an audit could involve referring agencies to other enforcement bodies and issuing targeted guidance or guidelines to address compliance gaps. Over the last 10 years, the IPC has followed-up a number of audits with a further audit, to monitor compliance. These follow-up audits evaluate and comment directly on the agency's response to previous recommendations.

The annual report to Parliament by the Information Commissioner under section 37 of the *Government Information (Information Commissioner) Act 2009* also notes the outcomes of audits, the steps taken by agencies in response, and the IPC's follow-up actions.

QUESTION:

b. Should the Commission aim for more 'onsite' audits, rather than 'desktop' audits?

ANSWER:

Through its current audit program, the IPC strives to make the best use of its limited resources to identify and monitor the compliance risks of government agencies and to support the integrity of the legislative framework for information access and privacy rights in NSW.

From the start of the COVID-19 pandemic, the IPC made adjustments to how its work was done, including more reliance on desktop audits than onsite audits. Each audit aims to be as efficient as possible, to minimise the resource burden on the IPC and the target agency.

Desktop audits are effective in many circumstances. A decision whether to undertake a desktop or onsite audit should be informed by a number of factors, including the nature of the matters that are under assessment, how best to measure compliance in the particular case and the costs involved.

QUESTION:

4. Your reports noted a decline in 'agency assistance', alongside a decline in successful information access requests. You have also noted that there is a consistently high rate of invalid GIPA applications, particularly in the government sector. Does this indicate an issue with the current frameworks?

ANSWER:

The reported data in relation to agency assistance was derived from the 2022 Community Attitudes Survey. As noted in the Annual Report 2022-2023, this survey provides an indication of broad sentiment in the community. The IPC will consider these results in conjunction with the 2023 results to identify if there is any issue that suggests further intervention is appropriate.

In relation to the percentage of invalid applications reported by agencies, this has remained stable since 2018, falling slightly from 15% to 13% in that time. This is notable as the total number of applications has grown by 50% (rising from 16,000 to 24,000) in that same period. Of the 13% that were reported as being invalid initially, agencies also reported they successfully supported many applicants to make over half of those applications valid, resulting in only 5% of all access applications being refused on grounds of validity.

More information from agencies about the reasons why applications are invalid would assist the IPC to undertake further compliance and education activities. In light of the Information Commissioner's recent report to Parliament under section 37 of the *Government Information*

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(Information Commissioner) Act 2009, where the invalidity results continue to be consistent with previous years, this matter is under active consideration.

QUESTION:

5. Have there been any adjustments to the Commission's planning, budget or staffing due to the COVID-19 pandemic, particularly regarding data security and privacy during the pandemic's increased reliance on digital platforms?

ANSWER:

Prior to the start of the COVID-19 pandemic, the IPC was transitioning to managing case files electronically and to the adoption of laptops for all staff. These efforts enabled the IPC to transition relatively smoothly to remote working during periods of stay-at-home public health orders and, more recently, to a hybrid working environment.

Some changes also needed to be made to the work practices of the IPC, such as moving from onsite compliance auditing to more desktop auditing, to minimise health-related risks and to comply with public health orders.

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