information and privacy commission
new south wales

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Ms Vanessa Viaggio
Principal Council Officer
Upper House Committees
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: law@parliament.nsw.gov.au

Dear Ms Viaggio,

Answers to questions on notice: Inquiry into remedies for the serious invasion of privacy in New South Wales

I refer to your email of 4 November 2015 attaching the transcript of my recent appearance before the Committee.

Please find attached responses to the questions on notice raised by Committee members in my capacity as Chief Executive Officer, Information and Privacy Commission, and as Information Commissioner.

I would also like to make some corrections to the transcript. These appear at:

- Page 10, paragraph 2, second sentence: please include the following bolded word:

  *"...that would be something that in my capacity as the IPC **CEO** I would be actively pursuing"*

- Page 10, paragraph 6, final sentence: please remove struck out text and include the bolded text:

  *"...So ~~they~~ **there** are an ~~application~~ **applications** made under the GIPA Act, and ~~its~~ **the** reporting, I would absolutely concede, is pretty global, for information of that nature"*

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

Yours sincerely

24 November 2015

Elizabeth Tydd
Chief Executive Officer
NSW Information Commissioner

ATTACHMENT A

Standing Committee on Law and Justice, Inquiry into remedies for the serious invasion of privacy in NSW

Hearing, 30 October 2015

Responses to Questions on Notice – Information Commissioner

Question 1: (Mr Shoebridge, page 11)

> "I just want to be clear—I may have misunderstood you. There were 90 occasions where your office was asked to review a decision by a government department not to release information because of privacy considerations and on not one of those occasions did you recommend the release of the information, on a review. Is that what you say?"

Answer

I can confirm my advice to the Committee that there were no external reviews in the reporting period in which the IPC recommended that the Information Commissioner consult with the Privacy Commissioner to facilitate a recommendation against a decision of an agency not to release personal information, pursuant to section 94 of the *Government Information (Public Access) Act 2009* (GIPA Act). This information is contained in the Information and Privacy Commission's Annual Report 2014/15.

I also confirm that the legislation does not provide the Information Commissioner with the power to 'overturn' an agency decision when exercising the external review functions. Rather, the Information Commissioner has powers of recommendation. In conducting external reviews, recommendations may be made to an agency:

- as the Information Commissioner thinks appropriate (section 92);
- that the decision be reconsidered and a new decision be made (section 93);
- against the agency's decision that there is an overriding public interest against disclosure of government information (section 94); and/or
- that any general procedure of an agency in relation to dealing with access applications be changed to conform to the requirements of the GIPA Act or to further the object of the GIPA Act (section 95).

The Information Commissioner's external reviews of agency decisions are delegated to employees of the IPC. As stated on the introduction of the *Government Information (Public Access) Bill* and the *Government Information (Information Commissioner) Bill* into Parliament, "*It makes sense to have a single body overseeing both the key issues relating to government information—privacy and public access.*"

In 2014-15, the IPC finalised 359 information access external reviews. Ninety five of these included privacy-related public interest considerations (often amongst other public interest considerations). The IPC made recommendations to agencies in 56 of those reviews.

Where the IPC made recommendations to agencies, those recommendations covered a broad range of matters such as, for example, the need to justify decisions, the conduct of searches for information within the scope of access applications, the form of access for release of information, and that agencies have regard to the matters raised and guidance provided in review reports, pursuant to sections 92 and 93 of the GIPA Act.

Question 2: (Mr Shoebridge, page 12)

> "Because you gave examples of both subjective and objective considerations for seriousness. Do you think it should be both?"

Answer

I note that there has been a consistent view expressed by the NSW Law Reform Commission (NSWLRC), the Australian Law Reform Commission (ALRC) and the Victorian Law Reform Commission (VLRC) that the threshold test should be an objective one, but the Commissions have put forward varying views on whether the threshold should include the concept of seriousness. The concept of seriousness warrants consideration and determination within a judicial or quasi-judicial context to appropriately address the evidential requirements.

These views were expressed in the Commissions' following reports – NSW Law Reform Commission, '*Report 127: Protecting Privacy in New South Wales*', May 2010, Australian Law Reform Commission, report 108, '*For Your Information: Australian Privacy Law and Practice*', August 2008, Australian Law Reform Commission, report 123, '*Serious Invasions of Privacy in the Digital Era*', June 2014, and Victorian Law Reform Commission, Final Report 18, '*Surveillance in Public Places*', May 2010.

The models proposed by the ALRC and NSWLRC built the consideration of competing public interests into the test of whether a person's privacy had been invaded, in the form of a balancing test in which the applicant's privacy was weighed against other relevant public interests. The ALRC's rationale for this approach in its 2014 Report was to acknowledge that there could be strong public interest grounds that justified the invasion of privacy, but the Commission also asserted that there should be a clear process for balancing competing interests. The ALRC noted that undertaking this balancing test would ensure that all relevant public interests were considered before a decision was made on whether there was a serious invasion of privacy.

The release of government information by a NSW public sector agency under the GIPA Act serves a vital public interest of advancing the accountability and transparency of government through providing access to government information for the general public. The GIPA Act contains a public interest balancing test that requires agency decision-makers to balance the factors for and against the disclosure of information, including privacy-related considerations. The GIPA Act provides mechanisms to enable individuals to seek a review or to complain about an agency's decision.

It is possible that the introduction of a statutory cause of action could indirectly influence decisions by NSW public sector agencies as to whether to release government information through any of the GIPA Act's four pathways of information release and access.

It should be noted that some of the models were developed before the GIPA Act was in place and none directly address the intersection with such legislation, although some do acknowledge the importance of public interest more broadly. For example, the NSWLRC (*Consultation Paper 1 Invasion of Privacy*, paragraph 1.7) identified that:

> *"...a cause of action for invasion of privacy may involve consideration of competing interests, including the public interest, that have not traditionally been relevant in the development of tortious causes of action."*

As noted in my submission, the GIPA Act provides a robust decision-making framework to achieve balanced outcomes in promoting the release of government

held information. The public interest served through the release of government information under the GIPA Act and the safeguards in place in the GIPA Act through the public interest balancing test and review/complaint processes should be taken into account in the design of a statutory cause of action of action, including the concept of seriousness.

The GIPA Act provides a mature decision making framework in which decisions relating to the release of government held information can be made. This framework recognises and respects the wider issues of information security and privacy. The extant legislative framework applying to information access and privacy provides a nexus (section 14 of the GIPA Act and section 5 and section 20(5) of the *Privacy and Personal Information Protection Act 1998*) to appropriately balance information access and privacy.

Supplementary question on notice – Information Commissioner

Question:

> "If the committee were to recommend a statutory cause of action for serious invasions of privacy, one option might be to recommend that a fault element encompassing negligence (as well as intent and recklessness) apply to corporations; while recommending a more limited fault element (intent and recklessness only) that would apply to natural persons.
>
> Do you have any concerns or comments in regards to this?"

Answer

As advised, the GIPA Act only applies to government information held by NSW agencies defined within the legislation. However that jurisdiction is relatively broad and includes universities, local councils, government departments, state-owned corporations and statutory bodies and Ministers and their personal staff. Section 121 of the GIPA Act also provides NSW public sector agencies with an immediate right of access to prescribed information contained in records held by contracted service providers.

Division 1, Part 6 of the GIPA Act provides protections for agencies and their officers from actions for defamation and breach of confidence, certain criminal actions and personal liability for actions or decisions that they have done and believe in good faith were permitted or required by the GIPA Act.

There will no doubt be other broader issues for consideration. As the Information Commissioner, my responses are strictly from the perspective of the GIPA Act.