Submission No 23

INQUIRY INTO STATE RECORDS ACT 1998 AND THE POLICY PAPER ON ITS REVIEW

Organisation: Information & Privacy Commission

Date Received: 6 April 2020

information and privacy commission
new south wales

3 April 2020

The Hon Shayne Mallard MLC
Chair, Parliamentary Standing Committee on Social Issues

For submission via:
https://www.parliament.nsw.gov.au/committees/inquiries/Pages/lodge-a-submission.aspx?pk=2588

Dear Mr Mallard

REVIEW OF THE STATE RECORDS ACT 1998

This is a submission to the Inquiry into the *State Records Act 1998* (SR Act) and the policy paper on its review. This is a significant Inquiry for the New South Wales (NSW) Government Sector and for NSW citizens and I welcome the opportunity to assist the Committee.

Introduction

As NSW Information Commissioner, I oversee the information access rights enshrined in the *Government Information Public Access Act 2009* (GIPA Act).[1] These rights are realised by agencies authorising and encouraging proactive public release of government information; and by giving members of the public an enforceable right to access government information. The GIPA Act provides that access to government information is restricted only when there is an overriding public interest against disclosure.

The SR Act provides for the creation, management and protection of the records of NSW public offices. Public access to these records is available during the open access period, which applies to records in existence for at least 30 years. While there are jurisdictional differences between the SR Act and the GIPA Act, both play an important role in public information governance and information access in NSW.

With the increasing adoption of technology, increased data holdings and new models of public service delivery, it is timely to be assessing whether laws relating to information governance and access are in line with community expectations and remain relevant. The proposed reforms to the SR Act seek to achieve four policy outcomes:

1. Stories that shape the social, historical and cultural identity of NSW are widely shared and understood.

[1] My functions are set out in a fact sheet about the IPC's functions (https://www.ipc.nsw.gov.au/sites/default/files/2020-01/Fact_Sheet_About_the_IPC%27s_functions_December_2018.pdf).

2. Records of enduring value to the citizens of NSW are managed, preserved and made accessible.
3. Citizens have timely access to records documenting the activities and decisions that shape NSW and the lives of its citizens.
4. NSW public offices create, keep and protect records as evidence of their activities and decisions.

In line with the Inquiry's terms of reference, the following comments are made with reference to:

i. the effect of the proposed reforms on NSW public offices, including NSW Government agencies, local councils, public health organisations and State-owned corporations
ii. whether the proposed reforms support digital government
iii. whether the proposed reforms will increase public knowledge and enjoyment of the stories that shape our social, historical and cultural identity, enhancing social outcomes for the people of NSW
iv. whether the proposed reforms will enhance the protection of the key cultural assets of NSW.

Proposals

1. A single institution will be responsible for collecting, managing, preserving and providing public access to government records, objects, buildings and places of historic, social, cultural or architectural interest to the people of NSW. This institution would replace the existing Authority and SLM and consideration would be given to conferring it with Executive Agency status, in line with the State's other Cultural Institutions.

2. A single governing body will be responsible for the strategic direction and policies of the new institution. Committees will have statutory responsibility for advising on and approving recordkeeping standards, the retention and disposal of records and the acquisition and management of buildings or places.

These two proposals are supported in-principle. Having a single governing body would support a coordinated approach to managing and protecting historical records and key cultural assets. It may also simplify access for members of the public to historical, social and cultural records in the open access period. In establishing any new body to replace the State Archives and Records Authority (SARA) of NSW and Sydney Living Museums (SLM), appropriate care should be taken to ensure the safe transfer and consolidation of state records, especially where these have not or are unable to be digitised and are only available in physical form.

The policy paper acknowledges that citizens' expectations around accessing information have evolved in an increasingly digital age. In light of this, the records governing body should continue to build its digital capability and make greater use of technology, in order to promote and enable faster, more effective and lower cost access to open access records.

Government information is increasingly created and held in digital form, which will change the ways in which public records are collected and managed in the future. The establishment of a new governing body presents an opportunity to embed information governance and principles of open access into record-keeping standards and processes from the earliest stages of their development. A key aspect to this will be to ensure the preservation and accessibility of all records, including physical resources, digitised copies and original digital records (or "born-digital" records).

Undertaking and oversighting this significant task will position the single institution and its governing body at the forefront of establishing and maintaining digital standards. Those standards will have application to the broader public sector and promote good record keeping and public access. This task will require resourcing, expertise and leadership and the creation of a single entity and governance body may better support this outcome.

Importantly, the right to access information is predicated upon the creation and preservation of records. This is reflected in the GIPA Act which recognises the pre-eminence of the SR Act.[2]

In this respect the independent regulatory roles of Information and Privacy Commission (IPC) and Information Commissioner are complementary to the role to be assumed by the proposed single entity. As IPC Chief Executive Officer, I have led initiatives to promote seamless engagement with the SARA to ensure that good regulatory outcomes, including the publication of guidance for agencies and audit/investigation outcomes, provide comprehensive guidance for agencies and citizens. This relationship must continue under any new administrative or legislative model.

3. Public offices will be required to make and implement plans to transfer control of records of enduring value that are no longer in active business use to the Authority. These plans may involve the immediate or postponed transfer of custody.

This proposal is supported in-principle as there is value in a single records authority having custody of and responsibility for the preservation of records of enduring value. It is important that whether it is the public office or the authority there is capacity to appropriately store, maintain and provide access to records of enduring value.

I note under Part 4 of the SR Act, SARA is entitled to control of State records not currently in use. It would be of assistance in understanding how this proposal supplements the existing regime to explore and define the meaning of 'records of enduring value' and clarify whether the proposal is limited to 'records' as defined in the SR Act or whether it is intended to include artefacts and other physical objects (noting proposals 1 and 2 above that suggest consolidation SARA and SLM).

[2] GIPA Act, section 123

In this regard a broad technically neutral definition provides the most comprehensive jurisdictional coverage. The GIPA Act provides a broad definition of *record*[3] and the value of this approach in ensuring that government information responds to a dynamic digital environment whilst capturing other more traditional forms of information/documents together with the need for alignment with the SR Act has been acknowledged in the 2017 Statutory Review of the GIPA Act.[4]

In a contemporary records environment three issues are paramount in providing access to information:

1. Who holds the information – what agency or other entity?
2. In what format is the information held and under what arrangement, including contractual arrangements?
3. How is access to be provided – what steps might be required to provide access in a variety of circumstances including software specifications for machine enhanced decision making?

The policy outcome operates under two conditions:

1. Public offices will be required to make and implement plans to transfer control of records of enduring value, and
2. that are no longer in active business use to the Authority.

Accordingly, a broad definition of information/record better supports the policy outcome because it captures information in all forms and under a variety of conditions. Those conditions may include information held by third parties under contractual arrangements. The regulatory outcome sought is action by public offices to transfer records of enduring value to the single entity. In this regard defining records of enduring value as a subset of records broadly together with the provision of practical guidance and processes for agencies may also promote the policy outcome. In this respect SARA's existing strategic and operational structure including that of the current Board together with creation of a single entity support this second limb of the policy outcome.

4. Records in the open access period will be open by default, *unless* the public office that is responsible for the records makes a 'closed to public access' (CPA) direction. The assessment could be based on a risk assessment, as is the case under the current provisions.

This proposal is supported in-principle. As an independent champion of open government, I support open access to government information. The proposal aligns with the object of the GIPA Act to open government information to the public. This object is to be realised by agencies authorising and encouraging proactive public release of government information (section 3(1)(a)); and by giving members of the public an enforceable right to access government information (section 3(1)(b)).

[3] GIPA Act, cl. 4 Sch 10

[4] https://www.parliament.nsw.gov.au/lc/papers/DBAssets/tabledpaper/WebAttachments/71594/GIPA%20Act%20and%20GIIC%20Act%20statutory%20review.pdf

Section 3(1)(c) of the GIPA Act provides that access to government information is restricted only when there is an overriding public interest against disclosure. It is the intention of Parliament that the GIPA Act be interpreted and applied so as to further its object (section 3(2)(a)); and that the discretions conferred by the GIPA Act be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information (section 3(2)(b)).

Section 5 of the GIPA Act provides a presumption in favour of disclosure of government information. Section 9(1) provides that a person who makes an access application for government information has a legally enforceable right to be provided with access to that information, unless there is an overriding public interest against disclosure of the information. There is a general public interest in favour of the disclosure of government information: section 12(1) of the GIPA Act.

Records being open by default in the open access period under the SR Act better aligns that Act with the open access provisions of the GIPA Act and the object of the GIPA Act to open government to the public, which is an important tenet in our system of responsible and representative democratic government.

Under the SR Act, there is a presumption that records in the open access period should be open to public access. However, there is an additional requirement for public offices to make either an 'open to public access' or 'closed to public access' direction for all records in the open access period.

For NSW public offices, the proposal would improve efficiency, by removing the requirement to make an access direction where there are no risks associated with allowing access. Making records in the open access period open by default would also enhance public access and generate openness and accountability in government. It also recognises as referenced in the discussion paper the ubiquity of information and increasingly ability to access historical records digitally. In this regard, I concur with the observation in the discussion paper that the current SR Act requirements are 'anachronistic'.

Section 52 of the SR Act provides that an assessment of whether records should be open or closed to public access should be based on the known or likely contents of series, groups or classes of records. This provision is supported by guidelines on making access directions, which set out some of the categories of information where a 'closed to public access' direction may be appropriate.[5]

In considering a risk assessment approach for open and closed access to records, regard may be had to the balancing exercise (or assessment) provided by the public interest test in the GIPA Act. The GIPA Act provides for a balancing of considerations in favour of and against disclosure, having regard to the public interest. The public interest test requires consideration of:

1. The presumption in favour of release of government information;
2. Identification of factors in favour of disclosure;
3. Identification of factors against disclosure; and
4. Balancing of factors to determine where the public interest lies

[5] https://www.records.nsw.gov.au/recordkeeping/advice/attorney-generals-guidelines/making-access-directions

There is an overriding public interest against disclosure of government information if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure. The principles set out in section 15 of the GIPA Act guide the application of the public interest test. One principle recognised is that disclosure of information which might cause embarrassment to or loss of confidence in the Government is irrelevant and must not be considered. There is recognised value in applying principles to guide public interest decisions.

Consideration should be given to the interoperability of the definitions of 'open access period' under the SR Act and 'open access' under the GIPA Act for reasons including consideration of how open access records are made available to the public. Such consideration recognises the difference in meaning of 'open access' by reference to the 'open access period' in the SR Act compared with 'open access' by reference to 'open access information' in the GIPA Act.

Flexible modes of access will best support increased public knowledge and enjoyment of state records and artefacts. Acknowledging that free and online access may not be practical for some records and artefacts, by way of example, section 6 of the GIPA Act requires that:

> …(2) Open access information is to be made publicly available free of charge on a website maintained by the agency (unless to do so would impose unreasonable additional costs on the agency) and can be made publicly available in any other way that the agency considers appropriate.
>
> (3) At least one of the ways in which an agency makes open access information publicly available must be free of charge. Access provided in any other way can be charged for.

5. The open access period will be reduced to 20 years in line with other jurisdictions and citizen expectations. This change could be phased in over a period of time.

This proposal is supported in-principle. In this regard, see my comments as to proposal 4 above. I note the proposal would bring the SR Act in line with the Commonwealth *Archives Act 1983,* under which most records are in the open access period after 20 years.

As noted in the policy paper, a closed to public access period of at least 30 years may be anachronistic, as the contents of state records are increasingly becoming available from other sources. Reducing the open access period will bring the SR Act into line with citizen expectations and the reality of information flows in a digital age.

6. The Authority will have power to issue a notice to require a public office to investigate its recordkeeping practices (whether generally or specifically) and report back on its findings to the Authority.

Parts 2 and 3 of the SR Act set out public offices' responsibilities for records management and preservation. However, the Act does not give the Authority powers to conduct mandatory audits or to require offices to investigate and report on their record-keeping.

This proposal is supported in-principle. As Information Commissioner, I have powers under the *Government Information (Information Commissioner) Act 2009* (GIIC Act) to conduct investigations and audits and deal with complaints[6]. For instance, under section 21 of the GIIC Act I may investigate and report on the exercise of any functions of one or more agencies under the GIPA Act, including the systems, policies and practices of agencies (or of agencies generally) that relate to functions of agencies under an Information Act.

This is an important regulatory compliance tool at my disposal to ensure agencies comply with the GIPA Act and the enforceable right of a citizen to access government information is safeguarded. These provisions are applied according to a proportionate risk based regulatory approach under the IPC's Regulatory Framework. [7]

The proposed approach is reflective of sound regulatory principles including proportionality, accountability and transparency. However, it is also important to consider independent verification mechanisms in any self-reporting scheme. Under the GIPA Act the Information Commissioner has the power to monitor and audit agency performance.[8] Consideration of this approach by way of direct vested authority or the power of referral to an investigative agency, including the IPC, may provide a more robust regulatory outcome that promotes confidence in the role and function of the proposed single entity.

The proposed change should maximise the Authority's ability to scrutinise compliance and help to promote good record keeping practices and a commitment to information governance in public offices. This is particularly important in circumstances where information may be held under a variety of arrangements and the legislative approach should ensure consistent regulatory outcomes in all circumstances.

The GIPA Act contains analogous reporting requirements. Section 125 requires each public agency to prepare an annual report on the agency's obligations under the GIPA Act, for tabling in Parliament by the relevant Minister. Part 3 of the GIPA Act also contains requirements for public agencies in relation to open access information. Agencies are required to:

- publish an Agency Information Guide identifying, among other things, the kinds of government information held by the agency, the information that the agency will make publicly available and the way the information will be made available
- make their policy documents available

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[6] The IPC's Annual Reports on the Operation of the GIPA Act demonstrate how my functions under the GIIC Act are utilised (https://www.ipc.nsw.gov.au/information-access/gipa-compliance-reports).

[7] https://www.ipc.nsw.gov.au/sites/default/files/file_manager/IPC%20Regulatory%20Framework%202016_.pdf

[8] GIPA Act, section 17(g)

- keep a log that records information about access applications made to the agency that the agency decides by deciding to provide access, if the information may be of interest to other members of the public
- keep a register of government contracts that records information about government contracts that have (or are likely to have) a value of $150,000 or more.

Monitoring compliance with these mandatory open access requirements is an important measure of open access under the GIPA Act and over recent years, we have seen a steady increase in compliance.

To support agencies' compliance with the GIPA Act, the IPC has established an online self-assessment tool. This tool allows agencies to:

- assess compliance against key privacy and information access requirements
- link to IPC guidance that promote better practices and enhance compliance
- generate dashboard reports detailing agency compliance levels
- more precisely identify areas where improvements are required and
- develop comprehensive plans to improve compliance with privacy and information access requirements.

Developing a similar resource in relation to record-keeping could be one way to support public offices to better meet their obligations under the SR Act.

I hope that these comments will be of assistance. Please do not hesitate to contact us if you have any queries. Alternatively, your officers may contact
Senior Project Officer on or by email at

Yours sincerely

Elizabeth Tydd
CEO, Information and Privacy Commission NSW
Information Commissioner
NSW Open Data Advocate