information and privacy commission
new south wales

Enquiries: Sonia Minutillo
Telephone: 1800 472 679
Our reference: IPC19/A000252

Ms Angeline Falk
Australian Information Commissioner and Privacy Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

By email: foidr@oaic.gov.au

Dear Ms Falk

Public consultation – Disclosure of public servants' names and contact details

The purpose of this correspondence is to provide a submission to the Office of the Australian Information Commissioner (OAIC) in response to its discussion paper on the disclosure of public servants' names and contact details.

Information and Privacy Commission

The Information and Privacy Commission NSW (IPC) is an independent statutory authority that administers legislation dealing with privacy and access to government information held information in NSW. The Information Commissioner upholds and protects information access rights, while the Privacy Commissioner upholds and protects privacy rights. Our comments do not apply specifically to the Commonwealth context, but arise from similar provisions and our experience as a regulator in NSW.

The role of freedom of information legislation in facilitating access to information

Similar to the Commonwealth *Freedom of Information Act 1982* (FOI Act), in NSW the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act) establishes a proactive, open approach to gaining access to government information in NSW. The object of the GIPA Act is to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective. Under section 5 of the GIPA Act there is a presumption in favour of disclosure of government information unless there is an overriding public interest against disclosure.

The guiding principle of freedom of information legislation, including the FOI Act and the GIPA Act, is to make information more accessible to the public. Such legislation embodies the general presumption that the disclosure of information is in the public interest unless there is a strong case to the contrary.[1] This places freedom of information legislation at the centre of the endeavour to achieve transparency and open government.

[1] Information and Privacy Commission NSW, *Report on the Operation of the Government Information (Public Access) Act 2009 : 2010-2013* (2013) 6.

It should be noted that the definition of "personal information" in Clause 4 of Schedule 4 to the GIPA Act specifically excludes "information about an individual ... that reveals nothing more than the fact that the person was engaged in the exercise of public functions". In this context, the individual's name and non-personal contact details, including the individual's position title, public functions and the agency in which the individual works, are not personal information.

Public interest test

Like the FOI Act, under the GIPA Act all government agencies must disclose or release information unless there is an overriding public interest against disclosure.

The High Court has noted that '[w]hen used in statute, the term ["public interest"] derives its content from the "subject matter and the scope and purpose" of the enactment in which it appears.[2]

Fundamental to the obligation to release information is the overarching presumption in favour of disclosure of information (GIPA Act section 5). This is a starting point for all decisions regarding information access. Accordingly, when deciding whether to release information, decision makers must commence the public interest test from the position of acknowledging the presumption in favour of disclosure of information.

The issue give rise to questions of accountability and transparency of decision makers in government agencies. In this context, public office holders and executives in positions of decision may have a heightened requirement for accountability and transparency. Section 12 of the GIPA Act provides a number of examples of factors in favour of disclosure of government information, including where disclosure could reasonably be expected to:

- enhance Government accountability
- inform the public about the operation of agencies, and
- ensure effective oversight of the expenditure of public funds.

In weighing the factors against disclosure, consideration may be given to whether disclosure would expose a person to a risk of harm or of serious harassment or serious intimidation (see section 14 of the GIPA Act). In this context, consideration should be given to the significance of the threat and whether it is of sufficient gravity or immediacy to displace the presumption in favour of disclosure.

Both the legislature and the judiciary have recognised that a high threshold is required to displace the presumption. Case law suggests that the claimed harm must have a real and substantial detrimental effect on the person. A subjective fear that release of the information may expose a person to a risk of harm or of serious harassment or of serious intimidation is not sufficient.[3] The threshold requires that the risk be more than the usual.[4] To meet the required threshold the 'intimidation or harassment needs to be heavy, weighty or grave and not trifling or transient'.[5]

---

[2] *Hogan v Hinch* [2011] HCA 4 (10 March 2011).
[3] *AEZ v Commissioner of Police (NSW) [2013] NSWADT 90*
[4] *Australian Vaccination Network v Department of Finance and Services* [2013] NSWADT 60
[5] *Pallier v NSW State Emergency Service* [2016] NSWCATAD 293

The role of privacy legislation

In NSW the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act) establishes the Information Protection Principles (IPPs) that govern how NSW public sector agencies collect, store, use and disclose personal information. The Act also contains a series of exemptions in specific circumstances. Similar principles can be found in the Commonwealth *Privacy Act 1988* as Australian Privacy Principles.

Privacy legislation contains a definition of *personal information*. In NSW, 'personal information' is defined in section 4 of the PPIP Act as 'information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can be reasonably ascertained from the information or opinion.'

Publication of public servants' personal information

The NSW Civil and Administrative Tribunal (NCAT) has recently considered matters that involve non-publication orders pursuant to section 64(1)(a) of the *Civil and Administrative Tribunal Act 2013* (NSW). A number of matters involved concerns about the names of individuals and extracts of information being extracted out of context and published online. For example in one matter, the Tribunal made a non-publication order in an instance where it recognised that the naming on social media of a staff member of a government agency could cause stress or a feeling of being threatened.[6]

Another recent case looked at the complaint handling function of an agency and discusses issues of confidentiality. In *DQE v The University of Sydney* [2019] NSWCATAD 132 the applicant sought access to information that is information of a personal nature concerning a complaint he made about an employee of the respondent. Among reasons given by the agency for not disclosing the information were that disclosure could reasonably be expected to reveal an individual's personal information,[7] and could reasonably be expected to contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* (NSW).[8]

The Tribunal heard that employees, students and members of the public are reluctant to participate in investigations without an assurance of confidentiality. The Tribunal stated that confidentiality is generally integral to complaint handling processes. The Tribunal was satisfied that disclosure of the information could reasonably be expected to prejudice the supply to the agency of confidential information that facilitates the effective exercise of the agency's complaint handling function,[9] and could reasonably be expected to prejudice the effective exercise by the agency of its functions.[10]

Further comments

Through freedom of information legislation, such as the Commonwealth FOI Act or the NSW GIPA Act, the government has created a scheme under which a person can seek

---

[6] *Fraud Detection & Reporting Pty Ltd v Department of Justice* [2018] NSWCATAD 63.
[7] Clause 3(a) of the table to section 14 of the *Government Information (Public Access) Act 1998* (NSW) (GIPA Act).
[8] Clause 3(b) of the table to section 14 of the GIPA Act.
[9] Clause 1(d)) of the table to section 14 of the GIPA Act.
[10] Clause 1(f) of the table to section 14 of the GIPA Act.

access to information that is held by the government. Making government open, accessible, fair and transparent can increase citizen engagement. With citizen input to government policy and service delivery, a more effective democracy ensues.

However, in making government information available, agencies must consider the balance between the public's enforceable right to access information, the public interest and the rights of individuals (including public servants) to have their privacy rights upheld and protected, particularly where releasing the information would cause harm or negatively impact the agency's ability to exercise its functions.

We hope that these comments will be of assistance. If you have any questions, please do not hesitate to contact Ms Sonia Minutillo, Director Investigation and Reporting on 1800 472 679, or by email, [redacted]

Yours sincerely

[redacted]

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

31 July 2019

[redacted]

Samantha Gavel
Privacy Commissioner

31 July 2019