information and privacy commission
new south wales

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Your reference: LEGAL5129/17
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Dear Ms Kaban Lida

Review of the Royal prerogative of mercy

I refer to the letter of 21 December 2017 seeking comment on the review into the exercise of the Royal prerogative of mercy and petitions to the Governor for review of convictions and sentences and, specifically, whether petitions and their outcomes should be made publicly available.

As NSW Information Commissioner, my responsibility is to promote the objects of the *Government Information (Public Access) Act 2009* (GIPA Act). Those objects include supporting public awareness and understanding of the public's rights to information, and advancing a system of responsible and open government. In order to achieve this, the GIPA Act framework is based on principles of proactive disclosure, an explicit presumption in favour of public disclosure of information, and a public interest decision-making test.

Understanding the Royal prerogative of mercy

The Royal prerogative of mercy is an unfettered power vested in a monarchy to pardon a person convicted of a crime. The purpose of the power is to safeguard against injustices which have occurred in a criminal justice system. As a Commonwealth nation, in each Australian jurisdiction the Royal prerogative of mercy is conferred on the Governor-General or Governor[1] to enable them to grant clemency in exceptional circumstances on the basis of a petition from an individual regarding a conviction. The result of the consideration of the petition may be that the petitioner is pardoned, their sentence is mitigated or an inquiry is conducted into the conviction.

[1] The Governor-General exercises the Royal prerogative of mercy in relation to offences under Commonwealth or Territory law and this power is bestowed on the Governor in each of the states under the provisions of the *Australia Act 1986*.

The Royal prerogative of mercy is a broad discretionary power, and the decision of the Governor in regard to petitions for mercy is guided by the binding advice of the respective executive government[2]. The function sits outside the framework of the judicial system.

It is worth noting that other Commonwealth jurisdictions which have the Royal prerogative of mercy have taken steps to minimise the need for exercise of the power. For example, South Australia has enacted legislation which provides for a judicial post-conviction review. The legislation[3] modifies the common law restriction that a person may only have a single appeal. This enables a person to appeal their conviction a second time when 'fresh and compelling new evidence'[4] through a further judicial review process as opposed to a review by the executive arm of Government through the Royal prerogative of mercy.

I note that there are no legal limits on the considerations which may be taken into account either for or against a petition. Legal commentary has suggested that given the rise of factors able to be considered in the exercise of the Royal prerogative of mercy, and in general under the institution of mercy, the public interest may be better served by certainty[5]. That objective of certainty would be well supported by transparency of process and outcomes[6].

Application of the GIPA Act

The exercise of the Royal prerogative of mercy in NSW under section 76 of the *Crimes (Appeal and Review) Act 2001* is a decision for the Governor. Section 77 provides for a range of considerations which can be made in relation to petitions. For example, that the Governor may direct that a judicial officer conduct an inquiry into the subject conviction, and the Minister may refer the matter to the Criminal Court of Appeal to be dealt with as an appeal or for opinion. Further, both the Governor and the Minister have decision-making powers in relation to the consideration of petitions.

In referencing the GIPA Act throughout this submission it is recognised that the Act has application to an 'agency' within jurisdiction. The term 'agency' is defined in section 4 and Schedule 4, clauses 2 and 3 of the GIPA Act. I would particularly note Schedule 4, clause 3 which specifically provides that a 'public office', which would constitute an 'agency' for the purposes of the Act, does *not* include the office of the Governor. Additionally, Schedule 1 clause 3 provides that there is a conclusive presumption of an overriding public interest against disclosure of certain types of information of the Executive Council. Further, Schedule 2 provides that the Act does not apply to the exercise of judicial functions which would include any inquiry conducted by a judicial officer or consideration of a petition by the Criminal Court of Appeal.

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[2] Caruso, D and Crawford, N. (2014) 'The Executive Institution of Mercy in Australia: The case and model for reform', UNSW Law Journal, volume 37(1), p 312.
[3] *Statutes Amendments (Appeals) Act 2013* (SA)
[4] Section 337, *Criminal Law Consolidation Act 1935* (SA)
[5] Caruso, D and Crawford, N. (2014) 'The Executive Institution of Mercy in Australia: The case and model for reform', UNSW Law Journal, volume 37(1), p 348.
[6] https://gg.govt.nz/office-governor-general/roles-and-functions-governor-general/constitutional-role/royal-prerogative-mercy

However, Schedule 4 clause 2, which details what constitutes a 'public authority', is also relevant to the process described in the terms of reference to the Review in that the exercise of the Royal prerogative of mercy by the Governor may be informed by advice provided by the Attorney-general of NSW who falls under the definition of 'public authority'.

Accordingly, this submission traverses the application of the GIPA Act in accordance with its application of the objects of the Act under section 3 and 'government information' generally. In any event, I consider that the framework and principles of the GIPA Act should be generally applied to guide the formation of a procedure for disclosure of petition material.

Considerations for the Review

Having carefully considered the terms of reference for the review and the related materials, I am of the view that there are a number of key considerations in relation to the release of information. These include the public interest, the furtherance of public debate through the petition process, fairness to the petitioner and the procedure for disclosure of petitions.

1. Public interest and disclosure of information

The exercise of the Royal prerogative of mercy is to achieve a remedy for an individual in exceptional circumstances where they have been wrongly convicted or sentenced and where it is necessary to exercise the power in the public interest. Accordingly, application of the principles of openness and accountability of decision making in the public interest are complementary to the exercise of the Royal prerogative of mercy. In determining whether petition information should be released and, in the event of release, which material should be released, the public interest should be carefully examined.

Under section 5 of the GIPA Act, there is a general presumption in favour of disclosure of information unless there is an overriding public interest against disclosure of the information. This requires decision-makers to identify and weigh public interest factors in favour of disclosure under section 12 of the GIPA Act with public interest factors against disclosure as detailed in section 14 of the GIPA Act. The only other factors that can be considered in determining the public interest are those provided in the Schedule to the GIPA Act. Balancing public interest factors is conducted on a case by case basis and enables the decision-maker to consider each case on its merits.

It is in the public interest to have open and transparent processes of decision-making to ensure public confidence. The purpose of government's ability to exercise its functions is to serve the community and the government is responsible to ensure accountability and transparency to the public in the exercise of the functions of government. Maintaining such accountability and transparency is only possible if the public are able to access information around government decisions.

However, I note that there are provisions in Schedule 1 of the GIPA Act that may be relevant to the exercise of the Royal prerogative of mercy which prescribe when there is a conclusive presumption of an overriding public interest *against* disclosure of particular types of information. This includes, but is not limited to, cabinet or executive council information, information which is subject to secrecy provisions under other legislation, and information which may be subject to legal professional privilege.

Further, due to the circumstances giving rise to the consideration of the exercise of the Royal prerogative of mercy, including advice of the Attorney General, the provisions concerning responsible and effective government; law enforcement and security; and individual rights, judicial processes and natural justice in the table to section 14 of the GIPA Act may also have direct application.

Under the GIPA Act, application of the public interest test is underpinned by a mechanism for consultation through section 54 of the Act concerning the release of certain types of information. The consultation process under section 54 provides an opportunity for third parties affected to have an opportunity to comment on the proposed release of that information. While the consultation is not determinative in the decision made as to the disclosure or not, it can be important to the application of the public interest and the weighting of factors in favour and against release of information.

In the current context where a decision is made to disclose information related to the exercise of the Royal prerogative of mercy, there would be value and benefit in consultation with affected third parties including the victim and/or their family to ensure that information is not released improperly or in a manner which may cause harm or detriment and any views are considered in the decision to release or not release.

2. Protection of privacy of the petitioner

In a petition for the exercise of the Royal prerogative of mercy, the petitioner may raise compassionate grounds for consideration of a petition such as mental illness or developmental disability. These matters may reference personal information as defined under Schedule 4, clause 4 of the GIPA Act. Relevantly, the GIPA Act provides in the table attached to section 14(3) provides that there is a public interest consideration against disclosure of information which could reasonably be expected to reveal an individual's personal information, or contravene privacy protections under the *Privacy and Personal Information Protection Act* 1998 or the *Health Records and Information Privacy Act 2002*.

There are provisions in the GIPA Act which allow for the alteration of records in certain circumstances. For example, section 74 of the GIPA Act provides for the deletion of information from the copy of a record and section 75 enables the creation of new records to facilitate access to information. These and other mechanisms may well serve the purpose of promoting the public interest in transparency of decisions whilst also safeguarding individual rights.

The issues raised here should be carefully examined in the consideration of the publication of petition information following the exercise of the Royal prerogative of mercy.

3. Furtherance of public debate

It is of benefit to public debate to be aware that although a petitioner's sentence may be current and ongoing, the decision by the courts can be reconsidered through the exercise of the Royal prerogative of mercy by the Governor. Therefore, there is a public interest to be served in providing transparency in relation to the exercise of the Royal prerogative of mercy as it relates to factors which include: how a petition is made and the outcome of the exercise of this power.

As such, adopting a similar approach to the considerations relevant to the release of information as is provided under the GIPA Act would support transparency.

Conclusion

The exercise of the Royal prerogative of mercy will necessitate the consideration of a range of factors and information contained in a number of documents. To promote public confidence and achieve accountability and transparency it may be appropriate to determine the precise information and/or documents to be considered for release.

Information disclosed in relation to the exercise of the prerogative of mercy could range from a decision summary to all of the information considered by the Governor, including the petition itself. Accordingly, determining the parameters for material that should be made publically available including data about decisions, may contribute to an informed approach that achieves the balancing of the public interest objectives of open accountable decision-making and the promotion of transparency and trust in independent decision-making functions.

I hope these comments will be of assistance to you. Please do not hesitate to contact me if you have any queries. Alternatively, your officers may contact Sonia Minutillo on [redacted] or by email at [redacted]

Yours sincerely

[redacted]

9 February 2018

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