

The role of e-Governance and artificial intelligence in promoting inclusive approaches for Access to Information

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information and
privacy commission
new south wales

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Artificial Intelligence, e-Governance & Access to Information

Next steps in NSW digital government



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The current government information landscape

Characterised by three immutable features:

1. Digital government and data application
2. Increasing partnerships and outsourcing arrangements
3. Novel models of government that transcend traditional sectoral arrangements.

Securing the right to access information and the public interest – legal developments & adequacy

- *O'Brien v Dept Communities and Justice*
- *Calderwood v Department of Planning, Industry and Environment; Calderwood v Campbelltown City Council; Department of Planning, Industry & Environment v City of Ryde* [2020] NSWCATAD 200
- *Redfern Legal Centre v Commissioner of Police* [2021] NSWCATAD 288
- *Walton v Eurobodalla Shire Council* [2022] NSWCATAD 46

O'Brien v Dept Communities and Justice

- **Right of access to enable assertion of rights**
- Outsources algorithm
- Third party contractor – Intellectual Property
- Diminution of rights under section 121 of the *Government Information (Public Access) Act 2009* (GIPA Act):
 - (a) information that relates directly to the performance of the services by the contractor,
 - (b) information collected by the contractor from members of the public to whom it provides, or offers to provide, the services,
 - (c) information received by the contractor from the agency to enable it to provide the services
- **Is AI decision making or service provision or both, how do we audit?**

***Calderwood v
Department of
Planning, Industry
and Environment;
Calderwood v
Campbelltown City
Council;
Department of
Planning, Industry &
Environment v City
of Ryde [2020]
NSWCATAD 200***

- **A dynamic data set under a federated model of access to data**
- Government Departments and Local Councils shared portal for purposes of register of combustible cladding
- Council access limited to specific information
- Inputs from a number of sources e.g. Fair Trading Home Building
- GIPA requests made to Councils (4) and to Departments – joined by Departments of Customer Service and Fire and Rescue NSW
- Outcomes varied:
 - not held
 - access provided
 - access withheld – Items: 1(d); 1 (f); 2(d); 2(e); 2(f); 4(d) for Table to section 14 made out
- Multiple AI options and how is information access provided?

***Redfern Legal
Centre v
Commissioner
of Police [2021]
NSWCATAD
288***

- **What is Government information?**
- Results of strip searches drug related charges over distinct periods
- Separate data bases within NSW Police holding subsets of information
- SQL required by agency – substantial and unreasonable diversion of resources
- “Government information” is limited to information which exists at the time of the access application
- The Tribunal had regard to the context of the GIPA Act:
 - section 53(1) – information held by the agency when the application is received
 - section 75 – an agency is not obliged to create a new record in response to an access application
- The Tribunal held that the information sought was not “government information”
- **Consider data as the core ingredient to AI.**

***Walton v
Eurobodalla
Shire Council
[2022]
NSWCATAD
46***

- The Respondent's evidence indicated that records were routinely archived after a period of only 90 days.
- Irrespective of the retrieval process, the archive provision was not intended to operate in the manner relied on by the Respondent.
- Tribunal observed that arguably, all personal information held by agencies is mixed information.

**The three
fundamental
questions to
preserve
information and
secure access**

1. Who holds the information?
2. How access is provided?
3. In what form can access be provided?

Procurement contracts – essentials

Purchaser must have access to:

- data sets and any input to training; configuration, quality testing, potential bias and proposed methodologies
- test version of system and performance analysis
- training and technical manuals.

Vendor agrees to:

- undertake algorithmic impact assessment and revalidation
- waive legal rights in respect of purchaser's testing/auditing
- provide ongoing advice of any legal claims, systems failures/unintended consequences
- ensure system operates within law/compliance requirements and subcontractors compliance
- ensure security and access by purchaser.

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