

The Role of Access to Information laws in promoting integrity and preventing corruption – unique challenges in contemporary government

Presentation to the Corruption Prevention Network

16 August 2023

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Outline

1. What purpose does information access serve?

2. How does it manifest?

3. What risks does it mitigate?

- UN Declaration of Human Rights 1948 – Art 19
- Centre for Law and Democracy – RTI Rating
 - www.rti-rating.org
- Risks

The right to access information

What purpose does information access serve?

- UN Declaration of Human Rights 1948 – Art 19

*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference **and to seek, receive and impart information and ideas through any media and regardless of frontiers.***

UN Sustainability Goal SDG 16.10.2

The right to access information

How does it manifest?

- Centre for Law and Democracy – RTI Rating
 - www.rti-rating.org
 - 61 indicators: independent, appointment, funding, qualifications, jurisdiction incl. public funding, exemptions

What risks does it mitigate?

- Unexplainability
- Unaccountability
- Corruption/maladministration
- Democratic failures
- Unintended consequences:
 - inability to assert rights
 - service failure
 - discrimination
 - illegality

Outline

Government Information (Public Access) Act 2009

(GIPA Act)

- Object (s3)(1) to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective, the object of this Act is to open government information to the public by—
- Jurisdiction
 - Five sectors of government
- Four Pathways – the virtuous circle
- State Records Act (s123)

Government Information (Public Access) Act 2009 **(GIPA Act)**

- Object (s3)(1) **to maintain and advance a system of responsible and representative democratic Government** that is open, accountable, fair and effective, the object of this Act is to open government information to the public by—
 - (a) authorising and encouraging the proactive public release of government information by agencies, and
 - (b) giving members of the public an enforceable right to access government information, and
 - (c) providing that access to government information is restricted only when there is an overriding public interest against disclosure.

Government Information (Public Access) Act 2009

(GIPA Act) (cont.)

- **Jurisdiction**
 - Five sectors of government
- **Four Pathways – the virtuous circle**
 - Mandatory Proactive release (s6)– e.g. contracts; disclosures of interest
 - Authorised proactive release (s7)– e.g. data
 - Informal release (s8) – e.g. maintenance expenditure
 - Formal applications (s9) – e.g. Robodebt
- **State Records Act (s123)**

GIPA Act Offences & Protections

- Acting unlawfully (s116) (decision maker)
 - Directing action contrary to the GIPA Act (s117) (manager/supervisor)
 - Improperly influencing a decision (s118)
 - Unlawful access (s119)
 - Wilfully destroying/concealing government information (s120)
-
- Defamation or breach of confidence (s113)
 - Criminal action (s114)
 - Personal liability (s115)

Government Information Commissioner Act 2009

(GIC Act)

- Functions of the Information Commissioner – Ex ante and Ex post regulatory model
 - Receive complaints (s17)
 - Investigate (s22)
 - Own motion investigation (s21)
 - Powers of a Royal Commission (s29)
 - Cohesive/prevent contravention
 - Immunity (s42)
- Procedural fairness (s20, 22, 24)
- Publication
- Furnish Information (DPP, ICAC, LECC, Ombudsman, Children's Guardian)
- Offences (s43) incl. hinderance, failure to comply, mislead, falsely rep. as Commissioner/staff, employee protection and employer offence.

Assessing & Reporting

Compliance Committee

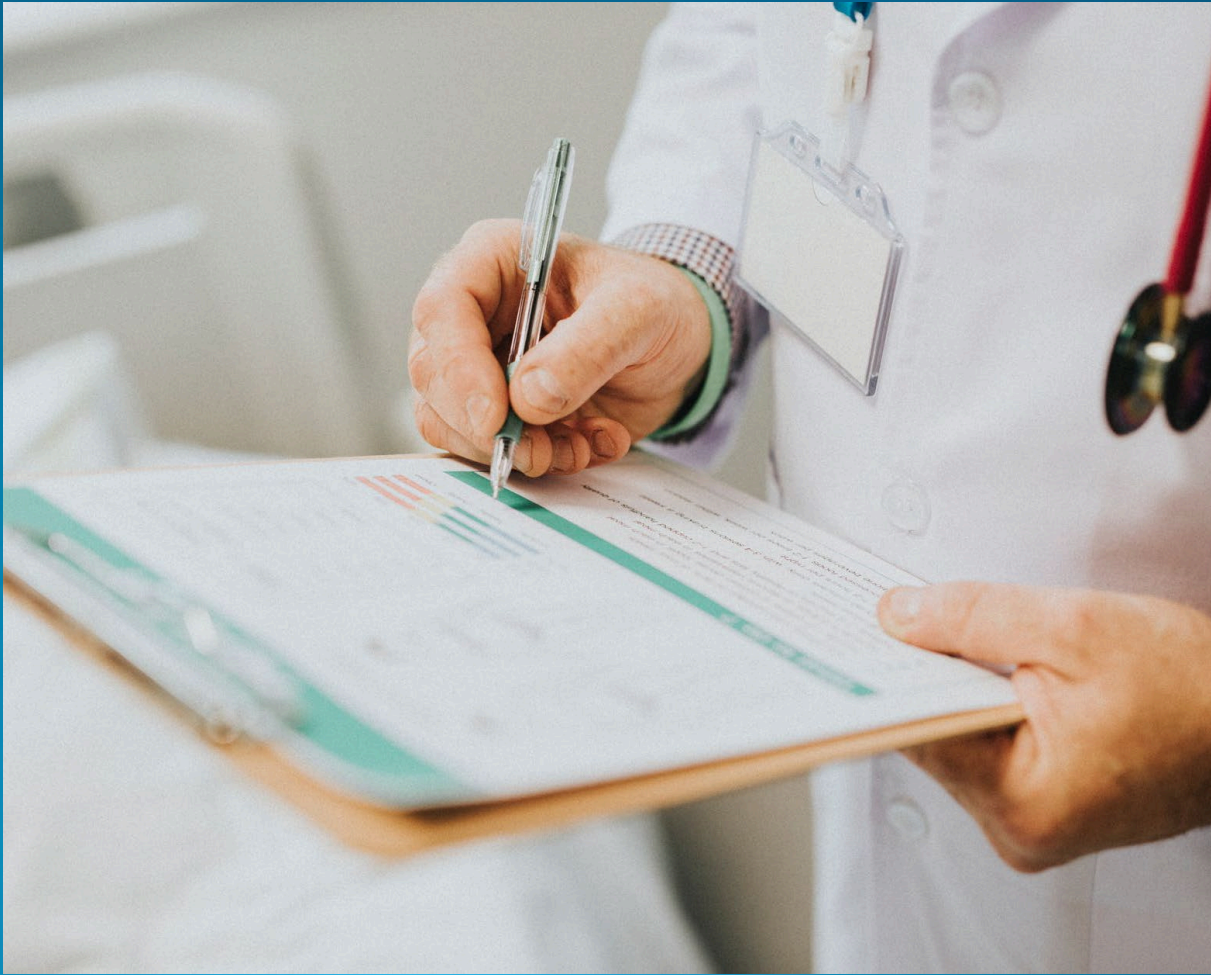
- S37 data
- GIPA dashboard
- Self assessment tools
- Review and complaints data
- Environmental scan
- Referrals
- Risk assessment

Compliance Reports

- Annual (s37 GIIC Act)
- Special Report (s38)
- Post investigation (s17 GIPA Act; and s21,24 GIIC Act)









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?**

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

- The Tribunal preferred the narrower construction of "**government information**"; that government information is limited to information which exists at the time of the access application.
- In making that determination the Tribunal had regard to:
 - the context of the GIPA Act, particularly:
 - section 53(1) which limits the obligation on an agency to provide access to government information in response to an access application to information held by the agency when the application is received
 - section 75 which provides that an agency is not obliged to create a new record in response to an access application

Ooi v NSW Ministry of Health [2023] NSWCATAD 107

- Request for the **patient data** used to **generate a report** of patients with a COVID diagnosis, vaccination status, severity of their illness, and age group.
- Agency – **did not hold a record/report**. Report to produce a snapshot at a particular point in time; access to data is only permitted for very limited purposes and is not to be retained other than for the prescribed purpose; linked patient information is extremely sensitive and the retention of those records would give rise to privacy concerns.
- Applicant offered that there must at least be a back-up and the agency is obliged to keep records under the *State Records Act 1998* (NSW).
- Found that the **agency does not hold the information sought** and that it is only in circumstances where access is to be given to information held that the discretion to make a new record arises.

***Ireland v
Central Coast
Council [2022]
NSWCATAD
366***

- In considering that the flood depth levels calculated by a proprietary flooding database developed by a private engineering consultancy, the Tribunal found that it was not clear on the evidence before it whether:
 - there was a government contract within the meaning of s. 121 of the GIPA Act
 - the calculation that is undertaken by way of an algorithm is provided to the Council under the contract
 - ownership of the dataset rests with the Council, or
 - that the Council has an “immediate right of access” to the information under a contract with the developer of the database.

Risk prevention and treatment

Contracts

- Test suite and data ownership
- Auditability and access
- Explainability
- Notice of adverse outcomes/incidents/complaints
- Require monitoring
- Access manuals
- Vendor vetting

Governance/Oversight

- Central repository of hardware and software
- Ecosystem oversight – 5 sectors of government
- Notice of use (s20(1)(b) GIPA Act)
- Realtime access and monitoring
- Human in the loop
- Legislate/regulate

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