

The freedom of information scheme in NSW as it relates to supporting the integrity of public administration in NSW

Presentation to the Law Society of NSW Public Law
and Government Solicitors Committees

15 October 2024

Rachel McCallum

IPC CEO, Information Commissioner



information and
privacy commission
new south wales

The Information and Privacy Commission NSW

Who we are

- IPC is an independent agency that supports the Information Commissioner and the Privacy Commissioner to oversight the NSW public sector in relation to privacy and information access. The Information Commissioner is the CEO.
- Some of the key IPC/Commissioner functions are:
 - Promote and protect privacy and information access rights in NSW
 - Provide information, advice, assistance and training for agencies and individuals
 - Review and audit the performance and decisions of agencies
 - Investigate complaints and manage PIDs about privacy and information access
 - Provide advice to the NSW Government about legislation and technology

The Information and Privacy Commission NSW

Our jurisdictions and who we regulate

The following types of NSW organisations are subject to oversight by the Commissioners:

- State government departments and agencies
- Universities
- Local councils
- Ministers
- State-Owned Corporations (under both jurisdictions from November 2023 – with some limits in privacy)
- Other NSW public authorities

In addition, private health service providers that collect, hold or use health information are also subject to the NSW privacy legislation.

Legislation and oversight

The IPC has specific functions under seven NSW Acts:

- *Government Information (Public Access) Act 2009 (GIPA Act)*
- *Government Information (Information Commissioner) Act 2009 (GIIC Act)*
- *Privacy and Personal Information Protection Act 1998 (PPIP Act)*
- *Health Records and Information Privacy Act 2002 (HRIP Act)*
- *Public Interest Disclosures Act 2022 (PID Act)*
- *Digital Restart Fund Act 2020 (DRF Act)*

Parliamentary oversight and administration of Acts:

- Committee on the Ombudsman, Law Enforcement Conduct Commission and the Crime Commission
- Allocation of legislation to ministers
 - Attorney General plus Minister for Customer Service and Digital Government
 - Minister for Health, Minister for Regional Health plus Minister for Mental Health

Role of the Information Commissioner

- Promote public awareness & understanding of the GIPA Act
- Provide information, advice, assistance & training to agencies and the public
- Assist agencies in the exercise of their functions under the GIPA Act
- Issue guidelines & publications to assist both agencies & the public
- Review GIPA decisions made by agencies
- Monitor, audit and report on agencies & their use of and compliance with the GIPA Act
- Make reports and provide recommendations to the Ministers about proposals for legislative and administrative changes
- Investigate complaints under the *Government Information (Information Commissioner) Act 2009* (GIIC Act)

The right to access government information

Universal Declaration of Human Rights 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.*

Principles of Open Government



OECD Principles of:

1. Integrity
2. Accountability
3. Transparency
4. Stakeholder participation

International Day for Universal Access to Information

- UN declared 28 September each year as an international day for recognizing the universal right to access information.
- In NSW, this has traditionally been celebrated under the banner of “Right to Know” week although other Australian jurisdictions now focus on the UN Day.
- In 2024, the theme celebrated by the UN was “Mainstreaming Access to Information and Participation in the Public Sector”.
- This year’s conference's main objective was to offer governments and civil society a list of best practices for mainstreaming the right to information into the organisational systems and culture of different public authorities.
- ICIC – International Conference of Information Commissioners: Australia on management committee for the first time.
- See recent articles in ICIC’s [newsletter](#) to celebrate IDUA.

Government Information (Public Access) Act

- Section 3(1) In order 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,
 - (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.

Authorised Proactive Release

- **Section 7** of the GIPA Act authorises and encourages agencies to make any government information held by an agency publicly available unless there is an *overriding public interest against disclosure*.
- This may include any government information or datasets that are compiled, recorded or stored in printed or electronic form.
- Agencies are required to conduct reviews of their program for the release of government information at least annually. New questions in GIPA Tool this year.
- NSW agencies should consider a public register of proactively released information.

Mandatory Open Access Information

GIPA Act requires all agencies to make specific information available:

Mandatory proactive release of certain government information

(1) An agency must make the government information that is its **open access information** publicly available unless there is an overriding public interest against disclosure of the information.

Note—

Part 3 lists the information that is open access information.

(2) Open access information is to be made publicly available free of charge on a relevant website (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.

(4) An agency must facilitate public access to open access information contained in a record by deleting matter from a copy of the record to be made publicly available if inclusion of the matter would otherwise result in there being an overriding public interest against disclosure of the record and it is practicable to delete the matter.

(5) An agency must keep a record of the open access information (if any) that it does not make publicly available on the basis of an overriding public interest against disclosure. The record is to indicate only the general nature of the information concerned.

(6) Nothing in this section or the regulations requires or permits an agency to make open access information available in any way that would constitute an infringement of copyright.

(7) In this section—

relevant website means—

(a) a website maintained by the agency, or

(b) for open access information prescribed under section 18(g) for which a website is prescribed by the regulations—the website.

Mandatory Open Access Information

GIPA Act requires all agencies to have an “agency information guide”

IPC is encouraging agencies to make sure their AIG is findable on their websites not buried.

20 Agencies must have agency information guide

(1) An agency (other than a Minister) must have a guide (its agency information guide) that—

- (a) describes the structure and functions of the agency, and
- (b) describes the ways in which the functions (including, in particular, the decision-making functions) of the agency affect members of the public, and
- (c) specifies any arrangements that exist to enable members of the public to participate in the formulation of the agency’s policy and the exercise of the agency’s functions, and
- (d) identifies the various kinds of government information held by the agency, and
- (e) identifies the kinds of government information held by the agency that the agency makes (or will make) publicly available, and
- (f) specifies the manner in which the agency makes (or will make) government information publicly available, and
- (g) identifies the kinds of information that are (or will be) made publicly available free of charge and those kinds for which a charge is (or will be) imposed.

(2) An agency must make government information publicly available as provided by its agency information guide.

(3) The Chief Executive of the Office of Local Government may, in consultation with the Information Commissioner, adopt mandatory provisions for inclusion in the agency information guide of local authorities. The agency information guide of a local authority must include any such mandatory provision unless the Chief Executive otherwise approves in a particular case.

Mandatory Open Access Information

GIPA Act requires all agencies to review AIGs annually and liaise with IC:

21 Adoption and review of agency information guide

An agency must adopt its first agency information guide within 6 months after the commencement of this section and must review its agency information guide and adopt a new agency information guide at intervals of not more than 12 months. An agency may update and amend its agency information guide at any time.

22 Role of Information Commissioner

(1) An agency must notify the Information Commissioner before adopting or amending an agency information guide and must, if requested to do so by the Information Commissioner, consult with the Information Commissioner on the proposed agency information guide or amendment.

(2) The Information Commissioner can issue guidelines and model agency information guides for the assistance of agencies in connection with agency information guides.

Mandatory Open Access Information

- [Council Sector](#) has specific open access requirements e.g. Returns of interests; Plans and Policies, information re DAs, approvals orders and other docs, Register of current disclosures of political donations kept in accordance with s328A of the LGA Act – (see GIPA Regulation)
- Recent issues in Council Sector – [Disclosures of interest 2021 Compliance Report](#) and [LG Sector Follow up GIPA Compliance Report 2023](#)
- Artificial Intelligence and automated decision-making – disclosure of their use is expected in AIGs. IPC has issued further guidance as part of the recent Right to Know Week in NSW. Focuses on the obligation in s20(1)(b) for the AIG to:
 - describe the ways in which the functions (including, in particular, the decision-making functions) of the agency affect members of the public

Digital government and transparency laws and policies

- IPC involved in advising the NSW Government in a number of ways about maintaining transparency rights and meeting transparency obligations in the digital government context.
- Formally through the DRF Act but also in relation to policy frameworks being development around artificial intelligence, digital inclusion and digital ID.
- August 2020 *Digital Restart Fund Act 2020* (DRF Act) – \$1.6B.
- S.10 – before approving funding for a project, the Minister must obtain and have regard to advice from the Information Commissioner and the Privacy Commissioner.

Digital government and transparency DRF

- Types of projects include:
 - portals as centralised information and transaction platforms
 - drones and smart technology
 - single notification services
 - data analytics projects and cyber security projects.
- May 2021, the NSW Information Commissioner and NSW Privacy Commissioner jointly issued advice titled [Digital Restart Fund: assessing information access and privacy impacts.](#)

Digital government and transparency – public interest analysis

Rights Preservation and the Public Interest

Will the project:

1. involve personal or health information?
 2. impact on the ability of an individual to access information?
 3. involve artificial intelligence, data matching, analytics or linkage?
 4. create new information?
- For access to information, consider current legislative and NSW Government obligations (next slide)

Digital government and transparency – current legislative and policy obligations

- **S. 20** of the GIPA Act concerning agency information guides –describes decision making functions ss(1)(b); various kinds of info. held (ss(1)(d)).
- **S. 23** of the GIPA Act, *open access* information - **s.6 s.18** - documents concerning decision-making functions of an agency that ‘affect or are likely to affect rights, privileges or other benefits, or obligations, penalties or other detriments, to which members of the public are or may become entitled, eligible, liable or subject’.
- **S.121** for an outsourced service, must include in the contract an immediate right of access to prescribed information.
- AI – all of the above but also comply with the (updated) [NSW AI Assessment Framework](#), including mandatory ethical principles relating to [transparency](#).

Digital government and transparency – current legislative and policy obligations

- Mandatory NSW ethical principles relating to transparency and accountability are directly relevant to “FOI”

Transparency

- Review mechanisms will ensure citizens can question and challenge AI-based outcomes
- Projects should clearly demonstrate:
 - a publicly available project objective and planned outcomes
 - how the public can question and seek reviews of AI-based decisions
 - how the community can get insights into data use and methodology
 - how the community will be informed of changes to an AI solution, including where existing technology is adapted for another purpose.

Future legislative change

- Mandate disclosure of the use of artificial intelligence and automated decision-making technology under GIPA Act mandatory open access information.
- Power to issue a notice to comply to agencies rather than relying on the statutory injunction power. Similar to the UK's ICO's powers – see its website on its [FOI regulatory action](#).
- May be particularly useful in cases of a failure to meet mandatory proactive disclosure requirements such as contracts disclosures, pecuniary and other interest disclosures and management of major assets.

Future legislative change

- Include the IPC as an integrity agency under the GSF Act to protect its resourcing and the commissioners' capacity to exercise their functions – new budget allocation rules now apply to the Audit Office, the ICAC, the Ombudsman, the LECC and the NSWEC.
- IPC not included despite being an integrity agency under the PID Act, despite similar information commissioner agencies in other jurisdictions being treated as integrity agencies, despite being oversighted by the same parliamentary committee as the Ombudsman and the LECC and despite FOI being previously (and in some other states/territories still being) an Ombudsman function.

Future legislative change

- Victorian Parliamentary Integrity and Oversight Committee has just released its [report](#) from its inquiry into its (old) FOI legislation. 101 recommendations.
- The report describes new legislation as a “third-generation ‘push’ FOI system Act (named the Right to Information Act). Recommendations specifically about “access-by-design” principles fit for digital context (while protecting privacy rights).

Questions



Connect with us



www.ipc.nsw.gov.au



ipcinfo@ipc.nsw.gov.au



1800 472 679



[/company/information-and-privacy-commission-nsw](https://www.linkedin.com/company/information-and-privacy-commission-nsw)



[@IPCNSW](https://twitter.com/IPCNSW)



[/InformationandPrivacyCommissionNSW](https://www.facebook.com/InformationandPrivacyCommissionNSW)



www.youtube.com/user/IPCNSW



information and
privacy commission

new south wales