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commission
new south wales

Sensitive



Our reference: D18/032484/DJ

Mr Lee Evans
Chairperson
Committee on the Ombudsman, the Law Enforcement Conduct Commission and the
Crime Commission
Parliament of New South Wales
6 Macquarie Street
Sydney NSW 2000

By email: lee.evans@parliament.nsw.gov.au

Dear Mr Evans

Investigation under the *Government Information (Information Commissioner) Act 2009* (GIIC Act)

I have recently finalised an investigation under the GIIC Act into the functions of an agency under the *Government Information (Public Access) Act 2009* (GIPA Act) and provided a report to the responsible Minister and the principal officer of the agency subject of the report in accordance with ss21(1) and (2) of the GIIC Act.

My investigation did not result in a finding that the conduct of the agency was conduct that constitutes a failure to exercise its functions properly in accordance with any provision of the GIPA Act (section 24(1) GIIC Act). However, I did recommend that the agency institute a program of immediate and long-term remediation to address identified risks and ensure compliance with the intent and provisions of the GIPA Act. The recommendations serve a process improvement and educative purpose.

The agency provided a response to my report and recommendations on 12 March 2018. The agency has responded positively and commenced implementing the recommendations.

Investigations under the GIIC Act are to be made in the absence of the public. Having concluded the investigation and considering the issues, relevant legislative obligations and my functions under the GIPA and GIIC Acts I have determined not to make a special report to the NSW Parliament in accordance with s38 of the GIIC Act and instead provide a report to the Committee. That report is attached.

The purpose of the report is to provide the Committee with information to support its functions in relation to monitoring and reviewing the exercise of my functions in accordance with s44(1)(a) and (c) of the GIIC Act. The report deals with the operation of the legislation, in particular the offence provisions contained in Part 6 Division 2 of the GIPA Act and application of relevant provisions in the context of the discrete facts presented in my investigation. Accordingly, the report does not provide any information which would identify the: GIPA access applicant; the agency; witnesses or other individuals involved in the matters investigated.

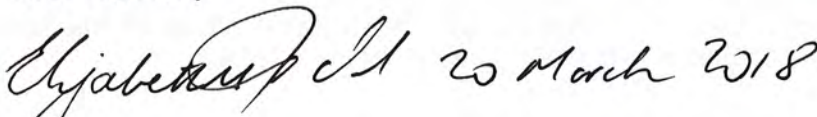
However, In accordance with my previous advice to the Committee I confirm that this investigation involves the systems, policies and practices of Transport for New South Wales.

My functions include issuing guidelines and other publications for the assistance of agencies and the public in connection with the GIPA Act (ss17(b) and (d) of the GIPA Act). Guidance, informed by issues related to the investigation will be issued to public sector agency heads to enhance systems, policies and practices that support information access responsibilities including training and performance monitoring in large public sector agencies. This guidance will not provide identifying information and will be available publically.

These actions are consistent with the reporting functions available to the Information Commissioner under the GIPA and GIIC Acts and I trust, effectively balance the rights and protections available to and relied upon by individuals relevant to this investigation.

I trust this information is of assistance and confirm that I remain available to discuss these, or any other issues with the Joint Committee. Please do not hesitate to contact me on (02) 8071 7017 or email, elizabeth.tydd@ipc.nsw.gov.au if you have any questions.

Yours sincerely



Elizabeth Tydd 20 March 2018

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

Section L: Provision of this report to the Joint Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission

I have recently concluded the first investigation to examine the offence provisions under the *Government Information (Public Access) Act 2009* (GIPA Act). These are significant matters and, in providing this report to the Chair of the Joint Parliamentary Committee, I seek to apply the expertise acquired in the course of the investigation to report on the exercise of my functions, enable oversight by the Joint Committee¹ and support the Joint Committee in monitoring and reviewing provisions of the GIPA Act.²

Government information provides the foundation of integrity upon which an open, fair and effective democratic system of government can be established and function. Government information also provides the most secure and faithful source of accountability to citizens served by democratically elected governments.

New risks and threats are an inevitable in governing. A measure of the effectiveness of a democratic government is its responsiveness to contemporary risks and threats to democratic systems and, in turn, its responsiveness to the citizens served through institutions and processes.

This investigation, its findings and conclusions demonstrate the unassailable role of the right to access information and information governance broadly in maintaining and advancing a system of responsible and representative democratic government that is open, accountable, fair and effective and the crucial importance of independent oversight of that right.

The role of Information Commissioner demands promotion of the advancement of an effective democratic system of government, together with a recognition of, and respect for, the role of the NSW Parliament.³ The statutory functions of the Information Commissioner fortify the independence of this role in effectively discharging oversight of regulated entities and contributing to the integrity of the NSW public sector by promoting the object of the GIPA Act and championing open government.^{4,5}

¹ GIIC Act section 44(1)(a) and (c)

² GIPA Act section 131

³ GIPA Act section 3

⁴ GIIC Act section 38

⁵ GIPA Act section 17(a)

Investigation outcomes

I am not comfortably satisfied that the agency failed to exercise its functions properly. My investigation concluded that the Secretary was ultimately able to uphold his GIPA Act responsibilities in respect of four GIPA access applications. In this regard, the GIPA application oversight systems were effective in remediating the actions of individuals and the vulnerabilities apparent in a devolved decision-making model.

In respect of the offence provisions I found that the evidence was insufficient to establish the elements of each offence to a level of comfortable satisfaction. In summary, my investigation did not establish that possible offenders were aware of the GIPA application at the time instructions to delete were issued or when actual deletion of government information occurred. Accordingly, no referral was made to the Director of Public Prosecutions or the Attorney General for a decision to prosecute an offence, as provided for by section 128(2) of the GIPA Act.

However, I did recommend that the agency institute a program of immediate and long-term remediation to address identified risks and ensure compliance with the intent and provisions of the GIPA Act. These recommendations serve a process improvement and general educative objective.

I acknowledge the positive response received from the agency to my draft report and the timely action taken by that agency to institute action relevant to my recommendations regarding GIPA training together with resource monitoring and application.

Reporting requirements

Investigations under the *Government Information (Information Commissioner) Act 2009* (GIIC Act) are made in the absence of the public.⁶ However following an investigation I must provide a report to the responsible Minister and the principal officer of the agency subject of the report.⁷ These requirements have been met. Additionally, my functions include issuing guidelines and other publications for the assistance of agencies and the public in connection with the GIPA Act.⁸ Relevant de-identified recommendations to assist in mitigating the risks identified in this investigation will be issued to assist public sector agencies and promote awareness and understanding of information access generally.

In my view, these actions are consistent with the reporting functions available to me under the GIPA and GIIC Acts and effectively balance the rights and protections available to individuals and relied upon by them in this investigation.

Investigation by the Information Commissioner – background

The investigation arose from a referral from ICAC on 27 October 2016, which necessitated examination of the offence provisions contained under the GIPA Act.

⁶ GIIC Act section 23

⁷ GIIC Act section 21(2)

⁸ GIPA Act section 17(d)(e)

Significantly, evidence available to the investigation and suggestions raised in the course of the investigation necessitated consideration of three of the five offences provided under the GIPA Act. The three offences of particular significance were:

- Section 117(b) – Offence of directing unlawful action
- Section 118 – Offence of improperly influencing decision on access application
- Section 120 – Offence of concealing or destroying government information.

The Crown Solicitor provided assistance and advice throughout the conduct of the investigation.⁹

My findings arising from the investigation were relevant to consideration of the powers of the Information Commissioner under the GIC Act. However, this is the only investigation of this nature conducted by an Information Commissioner in New South Wales and accordingly it derives from discrete facts that have been established to a comfortable level of satisfaction. Other contributions would also be informative in considering the offence and investigative provisions from a broader perspective.

The inclusion of offence provisions under the GIPA Act

In response to the NSW Ombudsman's 2009 report *Opening up government: review of the Freedom of Information Act 2009*, the GIPA Act created new offences for public officials who deliberately make decisions they know to be in contravention of the legislation, in addition to the offence for any person knowingly to direct or influence a public official to make an unlawful decision.¹⁰ The report considered it:

... essential the new Act contains robust measures to ensure the independence of decision makers under the legislation, including offence provisions to clarify and give support to their independence.

The Ombudsman's report recommended offence provisions for: any person to place undue pressure on decision makers to influence a determination; decision makers to wilfully fail to comply with the requirements of the Act, and an offence to destroy or conceal records.¹¹ It was envisaged that these offences would reinforce the importance of good record keeping, clarify and give support to the independent role of decision makers.

The GIPA Act rests on regulatory compliance as best secured by education and persuasion rather than enforcement. However, for persuasion and education to be effective, the real threat of enforcement must underpin the Information Commissioner's regulatory action through an escalation model.¹² This approach

⁹ GIC Act section 21

¹⁰ Report of the NSW Ombudsman, *Opening up government: Review of the Freedom of Information Act 1989*, February 2009, https://www.ombo.nsw.gov.au/data/assets/pdf_file/0017/3374/Opening-up-government_Review-of-FOI-Act-1989.pdf

¹¹ Report of the NSW Ombudsman, *Opening up government: Review of the Freedom of Information Act 1989*, February 2009, at pages 6, 11 and 12,

¹² See, for example, Braithwaite 1985; Ayres and Braithwaite 1992

is well articulated in the IPC's Regulatory Framework.¹³ In this context, the GIPA Act offences serve two regulatory purposes:

- an enforcement function to impose penalties upon persons committing the most serious contraventions of the GIPA Act; and
- a persuasive/educative function to deter persons from committing contraventions of the GIPA Act.

While the offence provisions should generally operate as a 'benign big gun', on the rare occasions where they are activated by the Information Commissioner, they need to operate effectively.¹⁴

The only other Australian jurisdiction with an offence provision similar to the GIPA Act offence of concealing or destroying government information preventing disclosure is Western Australia.¹⁵ The investigation did not identify any reported prosecutions in this jurisdiction.

In the United Kingdom, an Information Commissioner Office (ICO) decision dealing with a similar offence provision to section 120 the GIPA Act did not proceed due to being time-barred. The ICO found that:

*The complainant made an allegation that an offence under regulation 19 of the EIR had been committed. Although the emails referred to above indicated prime facie evidence of an offence, the Commissioner was unable to investigate because six months had passed since the potential offence was committed, a constraint placed on the legislation by the Magistrates Court Act 1980.*¹⁶

Accordingly there is limited directly relevant case authority to apply in dealing with the offence provisions under the GIPA Act.

Contemporary public sector structures

Since commencement of the GIPA Act, the machinery of government has evolved, particularly in the NSW government agency sector. Cluster arrangements and structures may not be well supported by legislative frameworks. However, agency heads responsible under the GSE Act (or other arrangements) for the cluster, and accountable for its performance and governance, are also responsible for ensuring, inter alia, that the cluster maintains compliance with all legislative obligations. This responsibility is highlighted in the GIPA Act.¹⁷

¹³ IPC Regulatory Framework 2016,

http://www.ipc.nsw.gov.au/sites/default/files/file_manager/IPC%20Regulatory%20Framework%202016.pdf

¹⁴ *Responsive Regulation: Transcending the Deregulation Debate*, Ayers and Braithwaite, 1992

¹⁵ Under section 110, a person who conceals, destroys or disposes of a document, or part of a document, to prevent an agency being able to give access to that document, commits an offence. Each of these offences carries a penalty.

¹⁶ ICO decision notice, https://ico.org.uk/media/action-weve-taken/decision-notices/2010/541184/FER_0238017.pdf

¹⁷ GIPA Act section 9(3)

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The objects of the GIPA Act provide a sound basis to secure good governance and guide the actions of the public sector in operationalising the intent of the Act to *open government information to the public and in doing so maintain and advance a system of responsible and effective representative democratic government that is open, accountable, fair and effective*.¹⁸

Upholding these responsibilities in cluster arrangements requires accepted and applied process and sound systems for governance and accountability. In particular, the GIPA Act envisaged a “*cultural change*”.¹⁹ That cultural change is advanced by a number of key legislative features.

The offence provisions have application in securing that cultural change and, accordingly, it is essential that they operate effectively under contemporary public sector structures and arrangements.

The arrangements for locating information to respond to GIPA access applications and identifying considerations for and against disclosure are more likely to be devolved to business areas, even where decision making is centralised, particularly in cluster arrangements.

There is an increasing use of electronic modes for the creation and management of government information, with fewer but faster touch points than traditional paper-based modes for effective decision making on retention, filing and retrieval of government information.

This devolved model is also associated with a fracturing of GIPA Act responsibilities which, in the absence of appropriate safeguards, presents risks of noncompliance and, importantly, failures in accountability. These failures are able to be exploited with potential compromise to the exercise of an agency’s functions under the GIPA Act. Therefore, specific remedial action is required under these arrangements to ensure that principal officers, particularly in cluster environments, are able to uphold their legislative responsibilities under the GIPA Act and, where applicable, government sector core values.²⁰

These broad ranging changes in the operational environment of agencies may not have been anticipated in the drafting of the offence provisions.

Operation of the offence provisions

In summary, the elements of the offences of directing unlawful action²¹ or improperly influencing decisions on GIPA access applications²² and concealing or destroying government information²³ require the establishment of facts to prove that the person who directs or takes unlawful action is aware at the time of making the direction or taking the action that the information fell within the scope of a GIPA

¹⁹ *Government Information (Public Access) Bill 2009*, 2nd Reading Speech LA, <https://www.parliament.nsw.gov.au/bills/DBAssets/bills/MinisterAiPSpeechLA/3119/LA%2052%2c%2053%2c%2054%2009.pdf>

²⁰ GSE Act sections 6 and 7

²¹ GIPA Act section 117(b)

²² GIPA Act section 118

²³ GIPA Act section 120

access application. Likewise, the conduct engaged in which constitutes influencing must be engaged in at a time when the offender is aware of the GIPA access application; and the offence of destroying or concealing government information lies only against an officer who actually destroys, conceals or alters the government information for the purposes of preventing disclosure of information as required by the GIPA Act – *as required* envisages in response to a GIPA access application. Accordingly, a knowledge and connection with a GIPA access application is contemplated in each of these offence provisions.

The requirement to establish a connection is further extended under section 117(b) of the GIPA Act, which requires that the offender issue a direction to an officer of an agency *involved* in an access application.

A finding that the offender had knowledge of the *requirements* of the GIPA Act is also necessary to establish the elements of the offences contained under sections 117, 118 and 120 of the GIPA Act.

Therefore, evidence of a lack of training and awareness of the GIPA Act may be sufficiently persuasive that the offender did not possess the requisite knowledge of the requirements of the GIPA Act. Accordingly elements of these offence provisions may not be established.

Directions to officers involved in a GIPA access application

The elements of the offence under section 117(b) of the GIPA Act require:

1. an offender to direct
2. an officer of an agency involved in an access application
3. to act in a manner
4. that the offender knows
5. is contrary to the *requirements* of the GIPA Act.

Accordingly, the offence may not be made out in circumstances where the officer receiving the direction may not, at the time the direction is issued, be aware of, or involved in the GIPA access application. However, the effect of the direction may be to limit the agency's capacity to respond to the GIPA access application because records may have been deleted and therefore not identified in response to a discrete search for information that is not subject to a 'forensic' or 'back end' retrieval process.

Knowledge of the GIPA access application and knowledge of permissible decisions under the GIPA Act

In summary, the elements of the offence under section 118 of the GIPA Act are:

1. the offender influences
2. the making of a reviewable decision by an officer of an agency
3. for the purpose of causing the officer to make a reviewable decision
4. that the offender knows
5. is not permitted (or required) by the GIPA Act.

This offence appears to have a broader application and may not require that there be any direct dealing between the offender and the decision maker. Therefore, the offence may contemplate circumstances including a failure to return documents in response to a request for searches; and/or a direction to a person not involved in a GIPA access application to destroy or conceal government information. However, to establish the elements of the offence, it must be proved that the offender had actual knowledge at the time of engaging in the conduct constituting the *influencing* that the conduct may render a *reviewable decision* impermissible.

These elements require a finding that the offender was aware of the GIPA access application at the time of engaging in the conduct.

Accordingly, the offence may not be made out in circumstances where a potential offender has a general knowledge of GIPA access applications as distinct from, actual knowledge of a specific GIPA access application and its scope. A broader interpretation of the provision may also be constrained by the application of the heading to the provision *decision on access application*.

A finding of knowledge of the requirements of the GIPA Act is also a necessary element of the offence under section 120 of the GIPA Act. This provision reflects a delineation between those who direct (section 117) and those who influence (section 118) and those who themselves engage in conduct.

In summary, the elements of this offence are:

1. the offender destroys, conceals or alters
2. any record of government information
3. for the purpose of preventing disclosure of the information as required (emphasis added) or authorised by the GIPA Act.

It follows that a key question in considering this offence is whether the offender destroyed information for the purpose of preventing disclosure under the GIPA Act. Accordingly, knowledge of: the requirements of GIPA Act; and the GIPA access application at the time of engaging in conduct to destroy, conceal or alter information is required.

GIPA access applications and temporal limitations

The obligation to provide information in response to a GIPA access application is, necessarily limited to information held by the agency when the access application is received.²⁴ Accordingly, information that is created and subsequently destroyed, altered or concealed after the receipt of a GIPA access application, but which may be germane to the access application or subject to authorised release under section 7 of the GIPA Act, may not attract the offence provision under section 117 or section 120 of the GIPA Act.

Complaints to the Information Commissioner

The offence under section 119 of the GIPA Act was not relevant to the facts of my investigation. This offence may be characterised as directed towards a third party intended to influence the conduct of a public official in the exercise of their functions, whether or not the offender is a public official.

²⁴ GIPA Act section 53(1)

The public sector is regularly and increasingly engaged with industry, members of the public and representative groups in the development of policy and service delivery options. These arrangements may well serve the interests of open government. However, the increasing prevalence of these arrangements may also give rise to circumstances in which the opportunities to obtain or seek to obtain unlawful access to government information increase.

In this context, it is relevant to recognise that the power to receive and deal with complaints under the GIIC Act does not extend to complaints about individuals external to the agency.²⁵ Accordingly, the Information Commissioner's role as an investigating authority is uncertain in respect of the offence under section 119 of the GIPA Act involving persons who are not public officials.

In contrast, section 28 of the GIIC Act provides that the Information Commissioner has standing to apply for an injunction restraining a person from engaging in conduct which would be captured by the offence provisions of the GIPA Act. This power does not appear to be limited to officers of agencies and therefore may have application to the offence under section 119 of the GIPA Act.

GIIC Act offences and the integrity of investigation processes

The GIIC Act also creates offences directed to preserving the integrity of the investigatory process undertaken by the Information Commissioner; and provide an effective deterrent against conduct that may have the effect of hindering a proper investigative process.²⁶

However, the GIIC Act is not an Information Act and, as set out above, the Information Commissioner's powers to prevent a contravention of an Information Act are therefore limited to Information Act offences.²⁷

Relevant to this investigation were the protections offered under the GIIC Act to persons assisting the Information Commissioner in conducting an investigation. These protections arise by codification of an offence in respect of *violence, punishment, damage, loss or disadvantage, dismissal or prejudice in employment* that has been sustained. Accordingly, the offence provisions, unlike those provided under section 43 of the GIIC Act do not appear to serve a preventative function.²⁸

In the course of this investigation, I raised and referred a suggestion of reprisal to the NSW Ombudsman for assessment in accordance with referral powers and established procedures. In correspondence dated 12 March 2018 TfNSW advised that on 6 March 2018 the NSW Ombudsman corresponded with TfNSW confirming that it found no evidence of reprisal and no further action will be taken. This report has been amended to properly reflect this development.

²⁵ GIIC Act sections 17 and 22

²⁶ GIIC Act section 43

²⁷ GIIC Act section 28

²⁸ GIIC Act section 43(4)

The way forward

The GIPA Act has been the subject of a statutory review process conducted by the Department of Justice. Following completion of that review in July 2017, I was invited to participate in a working group of senior officials of NSW government agencies charged with examining the suitability and efficacy of the *investigation, reporting and enforcement provisions* of the GIPA Act and GIIC Act. This working group should provide a valuable mechanism to examine relevant provisions that give rise to the exercise of the Information Commissioner's functions and provide the vehicle through which the perspective of regulated entities is ventilated and considered.

The working group also includes representatives of NSW integrity agencies. Their inclusion may assist in addressing the important aspects of effective independent regulatory oversight and facilitate examination of open government, good governance and integrity principles that underpin the object of the GIPA Act. The NSW Ombudsman's inclusion in the working group is particularly relevant given the referral provisions under the GIIC Act and public interest disclosures relevant to my investigation.

Engagement with regulated sectors provides a valuable contribution to advance the objective of effective, independent regulation. This objective is reflected in the IPC Regulatory Framework 2016 and will continue to be applied to promote the object of the GIPA Act.

The Joint Parliamentary Committee also has a role in considering provisions of the GIPA Act together with the exercise of the functions and reports of the Information Commissioner. This report is intended to provide an appropriate, balanced and respectful level of transparency regarding my consideration of the investigative and reporting functions under the GIIC Act, together with offence provisions under the GIPA Act, and support the Joint Committee in the exercise of its functions.