REVIEW OF THE *GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009*

Legal Aid NSW submission to the NSW Department of Justice

August 2014

Introduction

Legal Aid NSW welcomes the opportunity to provide comments in response to the statutory review of the *Government Information (Public Access) Act 2009* (GIPA Act).

Legal Aid NSW is uniquely placed to provide comments on the GIPA review both from an applicant and agency perspective. We make, and assists clients to make, GIPA applications to government agencies as well as being an agency that receives and processes access applications.

Legal Aid NSW is an advocate for, and supports, the policy objectives of the GIPA Act. We regularly proactively and informally release large amounts of information to the public and individuals.

However, the difficulty for our agency and presumably many other agencies is the resources required to process formal applications within the strict timeframes of the GIPA Act. Like other agencies, Legal Aid NSW is already forced to make difficult decisions to maximise its limited resources for core functions and it is challenging to absorb the additional, and often significant, burden of processing these applications. While taking time to process such applications is an understandable consequence of open government, the current effect of the GIPA Act in conjunction with the oversight of the Information and Privacy Commission is that agencies:

- Cannot always prioritise the applications they arguably should be prioritising,
- Cannot always identify and filter out vexatious applications, and

- Are often required to undertake unnecessarily burdensome processes before releasing information, which in some cases results in the information not being released at all.

Providing agencies with specific GIPA-related funding is one solution. Making amendments to the Act to produce a more targeted and balanced approach to open government is an additional solution.

We have structured our submissions that develop these arguments by referencing specific aspects of the GIPA Act below.

Section 60: Decision to refuse to deal with an application

The stated reasons in section 60 for which an agency can refuse to deal with an application should be revisited. The current provisions pose a number of difficulties.

1. *The phrase "unreasonable and substantial diversion of resources" is not clearly defined*

The GIPA Act provides little guidance about the meaning of "unreasonable and substantial diversion of resources". Even with reference to available case law (for example, *Colefax v Department of Education and Communities No 2* [2013] NSWADT 130), it can be difficult for agencies to gauge whether they should apply s 60(1)(a). This can result in agencies spending significant amounts of time processing requests, just to be sure it they are not in breach of the legislation, or alternatively, using the subsection to unfairly refuse a request, for example by overestimating the time to process an application.

Another issue for applicants is that agencies can legitimately refuse to process requests on the basis of the subsection, even when such a refusal will have an extremely detrimental impact on the applicant.

Case example 1

Legal Aid NSW has made a number of formal applications under the GIPA Act to assist children with a history of out of home care in accessing their records from the Department of Family and Community Services (FACS). The purpose of this process is to get access to records that may support victims compensation claims for events that occurred when the children were in out of home care.

In a number of cases FACS has refused to process the applications on the basis that the processing time to assess/provide the documents would constitute an unreasonable and substantial diversion of resources. This outcome leaves the young person without any way to access their records and without a way to support or properly assess their victims compensation applications. This effectively denies them the opportunity to access victims compensation.

The above case example illustrates that there are some circumstances when the amount of resources required to process the request should not be the overriding factor that determines whether an application is processed.

2. *No provision to refuse to deal with vexatious applicants*

Legal Aid NSW has a number of clients who frequently and persistently make GIPA applications without reasonable grounds, for improper purposes or as an abuse of the legitimate purpose of the GIPA Act. It is difficult to refuse these applications unless processing them would constitute an unreasonable and substantial diversion of resources. This means that our capacity to process legitimate access applications is restricted.

Case example 2

Ms X[1] has applied for legal aid on numerous occasions, and her applications are often refused. In response to this, she has lodged seven formal GIPA applications with Legal Aid NSW over a two year period: in March 2012, June 2012, July 2012, September 2012, May 2013, November 2013 and April 2014. The general form of her request is always for, "all notes, files, records, documents since the last GIPA application including, but not limited to, all notes, files, correspondence, emails, communications, memoranda etc from each and every staff member that has dealt with my matter since the last application".

Through these repeated GIPA applications Ms X harasses and annoys the staff who have determined her legal aid applications, and delays the finalisation of her various matters before different courts and tribunals.

[1] Applicant names have been changed

One solution could be for the GIPA Act to contain provision for an individual to be declared, by an independent arbiter, to be vexatious and unable to make additional applications to an agency without leave.

3. *Lack of guidance as to what constitutes a "related application"*

As with the term "unreasonable and substantial diversion of resources", it is very difficult for agencies to make the decision to treat multiple applications by the same applicant as "related applications" because of the lack of guidance about what this term means. The result is that some agencies will spend hundreds of hours processing potentially related applications unnecessarily, and others will refuse to process certain applications on the basis they are related, when this is not what the legislature intended.

Case example 3

Mr A made six access applications under the GIPA Act between January 2011 and September 2013. The applications all related to issues arising from Mr A's employment with Legal Aid NSW and, specifically, an incident which occurred in late 2010. There was a small degree of overlap between some of the applications, but for the most part the applications sought access to different information.

The multiple applications were not made to 'split' a single application to avoid a decision by Legal Aid NSW to refuse to deal with the application on the ground of unreasonable diversion of resources. Rather, they came about as a result of developments in Mr A's ongoing employment dispute with Legal Aid NSW, prompting Mr A to seek access to additional documents.

Each application could be processed within the 40 or so hours which Legal Aid NSW would consider reasonable for an application seeking access to documents about an applicant's personal affairs. However, the processing time for all six applications was far in excess of this. Legal Aid NSW made the decision to refuse to deal with one of the later applications on the ground that dealing with the application would require an unreasonable and substantial diversion of resources. In reaching this decision Legal Aid NSW considered that the previous applications made by Mr A were related to the current application.

Mr A applied to the IPC for a review of this decision (which he withdrew due to delay by the IPC in conducting the review) and then appealed the decision to NCAT. The Tribunal has not yet handed down its decision.

Since Legal Aid's decision to refuse to deal with one of Mr A's applications, the NCAT decision in *Colefax* has been handed down. In that case the relevant Department argued that a number of applications were related because all of them went to the issue of the applicant's employment with the Department. However, the decision of the Tribunal suggests that this approach is too wide. Unfortunately, the Tribunal doesn't provide any real guidance as to the correct approach, beyond saying that it is a question of degree to be assessed in the light of each case.

Section 54: Consultation on public interest considerations

The IPC has informally advised Legal Aid NSW that agencies are required to consult with third parties in accordance with section 54 even in circumstances where the authorised decision maker has formed the view that the information will not be released and consultation will not alter this view. This requirement can unnecessarily complicate the agency's processing of a request and lengthen the determination of the request for the applicant. It can also cause great distress to the third party concerned, who may have provided sensitive information to the agency (for example, as part of a confidential inquiry into workplace harassment) in circumstances where the public interest against disclosure is so overwhelming that the agency has no intention of releasing the information.

Section 57: Required period for deciding application

The GIPA Act sets tight timelines for determination of formal applications which can place a significant amount of pressure on authorised officers. The timelines can be particularly difficult to meet when, for example, there is a high volume of applications, or when the agency has been "shutdown" for two weeks over Christmas (the Act makes no provision for an extension to the timeframe in this circumstance). We note that the same, or comparable, timeframes do not apply to decisions of the IPC.

The tightness as well as strictness of the timeframes can lead to agencies overusing the "unreasonable and substantial diversion of resources" argument to refuse applications altogether, or even to establish a practice of "deemed refusal" as per section 63. If the

timeframes were more flexible it might encourage agencies to use their best efforts to process the applications, even if they are not processed as fast.

Additional general points

1. *Inaccessible language of the Act*

Legal Aid NSW's client base is almost exclusively from a very deprived and disadvantaged background and it is challenging for our authorised officers to draft decisions that comply with the legislation and are clear and straightforward for the reader.

The technical terminology of the Act is necessarily repeated in decisions made under the Act, which can lead to and heighten the sense of paranoia and mistrust that our GIPA applicants often feel.

2. *Recommendations in IPC review decisions*

While Legal Aid NSW understands the important role the IPC plays in providing guidance about best practice, sometimes the recommendations made as part of a particular review decision can give an applicant - particularly one who makes regular GIPA requests - unrealistic expectations about what an agency can and should achieve when processing an access request. Sometimes IPC best practice recommendations expand a request to such an extent that it becomes an "unreasonable and substantial diversion of the agency's resources".

In written notices of decision involving Legal Aid NSW, IPC recommendations have included the following:

- That in our written notice of decision we include a detailed schedule of documents. The schedule must include "itemising the documents falling within the scope of the access application, including a description of the record, location of the record within the agency, format of the record, public interest considerations in favour of, or against disclosure, the corresponding GIPA Act sections for any such considerations, and whether the information was released."

- That we "paginate all documents released to an applicant" and refer to page numbers in the schedule of documents.

In relation to a multi-party litigation and associated client case file, (a typical subject of access request at Legal Aid NSW) these requirements are extremely time-consuming, and will often expand a request to such an extent that processing it would constitute an unreasonable and substantial diversion of resources.

Conclusion

We hope that through this open consultation process that the recommendations of this review can strike a balance between the worthy policy objectives of the GIPA Act and the practical difficulties faced by government agencies in trying to comply with their obligations.

Thank you for the opportunity to provide these comments. Should you have any further questions, please contact Erin Gough at Erin.Gough@legalaid.nsw.gov.au or (02) 9219 5778 or Pilar Lopez at Pilar.Lopez@legalaid.nsw.gov.au or on (02) 9219 5933.

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the assistance, with a particular focus on the needs of disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house practice and grants of aid to private practitioners. Legal Aid NSW also funds a number of provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW criminal law practice provides legal advice and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Court, Children Court, District Court, Supreme Court and Court of Criminal Appeal in summary hearings, committals, indictable sentences and trials, and appeals. Legal Aid NSW specialist criminal law services include the Children's Legal Service, Prisoners' Legal Service and the Drug Court.