



NSW LAW REFORM COMMISSION

Report 126

Access to personal information

February 2010

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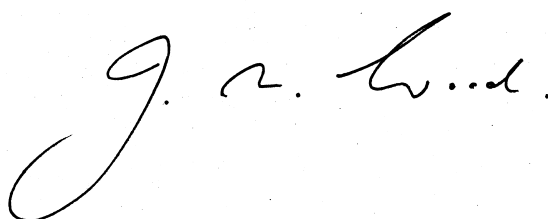
Letter to the Attorney General

To the Hon John Hatzistergos
Attorney General for New South Wales

Dear Attorney

Access to personal information

We make this Report pursuant to the reference to this Commission received June 2009.

A handwritten signature in black ink, appearing to read 'J. Wood', is centered on the page. The signature is written in a cursive style with a large initial 'J'.

The Hon James Wood AO QC

Chairperson

February 2010

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Terms of Reference

In a letter to the Commission received on 11 April 2006, the Attorney General, the Hon R J Debus MP issued the following terms of reference:

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the Law Reform Commission is to inquire into and report on whether existing legislation in New South Wales provides an effective framework for the protection of the privacy of an individual. In undertaking this review, the Commission is to consider in particular:

- The desirability of privacy protection principles being uniform across Australia.
- The desirability of a consistent legislative approach to privacy in the *Privacy and Personal Information Protection Act 1998*, the *Health Records and Information Privacy Act 2002*, the *State Records Act 1998*, the *Freedom of Information Act 1989* and the *Local Government Act 1993*.
- The desirability of introducing a statutory tort of privacy in New South Wales.
- Any related matters.

The Commission should liaise with the Australian Law Reform Commission which is reviewing the *Privacy Act 1988* (Cth) as well as other relevant Commonwealth, State and Territory agencies.

By letter received on 1 June 2009, the Attorney General, the Hon J Hatzistergos issued the following additional terms of reference.

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the Law Reform Commission is also to inquire and report on the legislation and policies governing the handling of access applications for personal information of persons other than the applicant under the *Freedom of Information Act 1989* (or any successor legislation).

In undertaking this review, the Commission is to consider in particular:

- The adequacy of the *Freedom of Information Act 1989* (and any successor legislation) concerning the handling of access applications for personal information in ensuring effective protection of individuals' privacy.
- The adequacy of existing policies, and whether any new policies should be recommended, for the handling of access applications for personal information of persons other than the applicant.
- The circumstances in which agencies should refuse to provide access to personal information of persons other than the applicant on public interest, including privacy, considerations.
- The extent to which public interest, including privacy, considerations against disclosure apply in respect of access applications for personal information of public officials.
- The intersection of, and desirability for a consistent legislative approach to, the treatment of personal information under the *Freedom of Information Act 1989* (and any successor legislation) and other legislation that is concerned with the protection of an individual's privacy.
- Any related matters.

The Attorney General subsequently asked the Commission to consider, as part of these terms of reference, the relationship between the Office of the Privacy Commissioner and that of the newly established Information Commissioner.

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LIST OF RECOMMENDATIONS

Recommendation 1 – *see page 19*

Privacy legislation and clause 4(1) of schedule 4 of the GIPA Act should define “personal information” as “information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified or reasonably identifiable individual, whether living or dead”.

Recommendation 2 – *see page 19*

In consultation with the federal Privacy Commissioner, the NSW Privacy Commissioner should develop and publish guidelines on the meaning of “identified or reasonably identifiable” in Recommendation 1.

Recommendation 3 – *see page 19*

Privacy legislation should specify the privacy principles that do not apply to the personal information of deceased individuals, namely, the principles in PPIPA s 9, 10, 11, 13, 14, 15; in HPPs 3, 4, 6, 7, 8, 12, 13; in UPPs 1, 3, 6, 9.

Recommendation 4 – *see page 26*

Privacy legislation should provide for its application to personal information that: (a) is collected for inclusion in a record or a generally available publication; or (b) is held in a record.

Recommendation 5 – *see page 33*

Privacy legislation should define “record” to mean any document or other source of information compiled, recorded or stored in written form or by electronic process, or in any other manner or by any other means, except a generally available publication.

Recommendation 6 – *see page 34*

Privacy legislation should define “generally available publication” to mean a magazine, book, newspaper or other publication (however published) that is or will be generally available to members of the public, though not necessarily free of charge, but does not include any publication or document declared by the regulations not to be a generally available publication for the purposes of the legislation.

Recommendation 7 – see page 34

Section 59A(2) of PPIPA (as inserted by schedule 1 [3] of the *Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009*) should be qualified so that it does not apply to the definition of “record” in PPIPA.

Recommendation 8 – see page 40

Clause 4(3)(b) of schedule 4 of the GIPA Act, which excepts from the definition of personal information “information about an individual (comprising the individual’s name and non-personal contact details) that reveals nothing more than that the person was engaged in the exercise of public functions”, should be repealed.

Recommendation 9 – see page 50

Privacy legislation (currently PPIPA s 4(3) and HRIPA s 5(3)) should provide that the only two exceptions to the definition of “personal information” are:

- (a) information about an individual who has been dead for more than 30 years; and
- (b) information of a class prescribed by the regulations, such regulations to be made only after consultation with the Privacy Commissioner or the Information Commissioner.

Recommendation 10 – see page 69

PPIPA should contain only one amendment regime.

Recommendation 11 – see page 71

Part 6A of PPIPA should be repealed.

Recommendation 12 – see page 71

If Recommendation 11 is not accepted, the detailed and prescriptive rules relating to access applications in Part 6A of the *Privacy and Personal Information Protection Act 1998* (NSW) should, so far as they are consistent with other provisions of *Privacy and Personal Information Protection Act 1998* (NSW), not form part of the IPPs, but be located elsewhere in the Act.

Recommendation 13 – *see page 75*

To the extent to which they are retained in any rationalisation of the principles and rules relating to the amendment or correction of personal information in privacy legislation, the provisions of Part 6A of PPIPA should be amended as follows:

(a) Section 59B should be amended to remove the words “to whom access to an agency’s document has been given”.

(b) Section 59B(a) should be amended to replace the words “information concerning the person’s personal affairs” with the expression “personal information”.

(c) Sections 59B(c), 59C(d), 54G(a), 59I(1)(a) and 59I(3)(a)(i) should be amended to include the word “irrelevant”.

(d) Section 59I(4) should be replaced by the following subsection:

(4) If an agency has already disclosed to any person (including any other agency and any Minister) any information contained in the part of its records to which a notice under this section relates, the agency, if requested to do so by the individual and provided it is practicable under the circumstances:

(a) shall ensure that there is given to that person, a statement:

(i) stating that the person to whom the information relates claims that the information is irrelevant, incomplete, incorrect, out of date or misleading, and

(ii) setting out particulars of the notation added to its records under this section; and

(b) may include in the statement the reason for the agency’s refusal to amend its records in accordance with the notation.

(e) Section 59J should be amended to provide that review of amendment decisions under Part 6A are to be made under Part 5 of PPIPA.

Recommendation 14 – *see page 81*

Part 4 of the GIPA Act should provide expressly that it does not apply to access applications that relate solely to the personal information of the applicant.

Recommendation 15 – *see page 84*

Section 20(5) of PPIPA should be amended in the following respects:

- (a) to exclude reference to PPIPA s 13 and s 15; and
- (b) to make it clear that an individual cannot obtain access to a document that is not subject to disclosure under the GIPA Act.

Recommendation 16 – *see page 106*

The review of the GIPA Act to take place under s 130 should expressly include consideration of the relationship between GIPA and privacy legislation, including:

- (a) whether the right of access to government information, and the presumption in favour of its disclosure, has resulted in practice in a failure adequately to protect privacy in NSW;
- (b) whether the extent of exclusion of unrecorded personal information from privacy legislation is consistent with the optimal protection of privacy in NSW; and
- (c) whether the extent of exclusion of generally available publications from privacy legislation and the GIPA Act is consistent with the optimal protection of privacy in NSW.

Recommendation 17 – *see page 112*

If Recommendation 8 is implemented, item 3(a) of the Table to Section 14 of GIPA may be amended to include the following words: “other than information about an individual (comprising the individual’s name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions”.

1. **Introduction**

- Background to the reference
- The context of this report
- Submissions and consultations
- Structure of this report

BACKGROUND TO THE REFERENCE

1.1 This report responds to the Attorney General’s request that, as part of our broader inquiry into privacy, we should report on the legislation and policies governing the handling of applications for access to the personal information of persons other than the applicant under the *Freedom of Information Act 1989* (NSW) (the “FOI Act”) and any successor legislation.¹ These additional terms of reference require us to consider whether the relevant legislation and policies provide effective protection of individuals’ privacy, in particular those relating to the circumstances in which agencies should be able to refuse access to personal information of persons other than the applicant on public interest, including privacy, considerations. Two particular matters to which we are directed to have regard are:

- The intersection and desirability for a consistent legislative approach to the treatment of personal information under the FOI Act (and any successor legislation) and other legislation that is concerned with the protection of an individual’s privacy; and
- The extent to which public interest, including privacy, considerations against disclosure apply in respect of access applications for personal information of public officials.

1.2 As part of this reference, we were also asked to consider the relationship between the Offices of the Privacy Commissioner and the newly established Information Commissioner. We have reported separately on that issue.²

THE CONTEXT OF THIS REPORT

1.3 The trigger for the additional terms of reference was the necessity to consider in detail the relationship between privacy legislation³ and

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1. For the terms of reference of our broader privacy inquiry as well as for the additional terms of reference covering the matters considered in this report, see p vii-viii.
 2. See NSW Law Reform Commission, *The Offices of the Information and Privacy Commissioners*, Report 125 (2009).
 3. Unless the context demands otherwise, “privacy legislation” in this report refers to the *Privacy and Personal Information Protection Act 1998* (NSW) (“PPIPA”) and to the *Health Records and Information Privacy Act 2002* (NSW) (“HRIPA”) as well as to any successor legislation.

2 | NSW Law Reform Commission

new legislation dealing with access to government information, traditionally known as “freedom of information” (or “FOI”) legislation. The new legislation is the *Government Information (Public Access) Act 2009* (NSW) (the “GIPA Act”) and associated Acts.⁴ The new legislation responds to the call in a Special Report to Parliament by the NSW Ombudsman for a new era in the disclosure of, and the facilitation of public access to, government information.⁵ Similar legislative initiatives have occurred, or are occurring, in the Commonwealth,⁶ Queensland⁷ and Tasmania.⁸

1.4 The focus of this report is on the relationship between the competing policies of two legislative regimes: one dealing with access to government information and the other dealing with individual privacy. We have taken as an obvious starting point that the legislation dealing with the two regimes should, so far as possible, operate as a “seamless code”.⁹ Where relevant, our recommendations attempt to achieve this in the context of current circumstances, to which three particular considerations are relevant.

1.5 First, as required by our terms of reference, we consider the issues raised by this report both in respect of the FOI Act and successor legislation, namely, the GIPA Act. The GIPA Act is not yet in force.¹⁰ When it does come into force, the FOI Act will be repealed.¹¹ This may suggest that what we have written in this report about the FOI Act is

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4. *Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009* (NSW) (the “GIPA Repeal Act”); *Government Information (Information Commissioner) Act 2009* (NSW) (the “GIIC Act”).
 5. NSW Ombudsman, *Opening up Government: Review of the Freedom of Information Act 1989* (NSW), a Special Report to Parliament under s 31 of the *Ombudsman Act 1974* (February 2009) (“Barbour Report”). See also FOI Independent Review Panel, *The Right to Information: Reviewing Queensland’s Freedom of Information Act*, Report (June 2008) (“Solomon Report”).
 6. See *Freedom of Information Amendment (Reform) Bill 2009* (Cth); *Information Commissioner Bill 2009* (Cth).
 7. *Right to Information Act 2009* (Qld); *Information Privacy Act 2009* (Qld).
 8. *Right to Information Bill 2009* (Tas); *Right to Information (Consequential and Transitional) Bill 2009* (Tas).
 9. See *Dagg v Canada (Minister of Finance)* [1997] 2 SCR 403, [45] (La Forest J dissenting but not on this point: see para A.27-A.29).
 10. Of the associated legislation, only the GIIC Act is in force.
 11. By the GIPA Repeal Act s 3.

destined to become of historical interest only. However, as various parts of this report make clear,¹² consideration of provisions of the FOI Act that are relevant to this report provides a springboard for analysis of those issues as they are likely to arise under the GIPA Act. Relevant provisions or approaches under the FOI Act are often similar to those in the GIPA Act, making the interpretation of the FOI Act and the experience of agencies under that Act particularly relevant to our analysis of the GIPA Act.

1.6 Secondly, we have concluded that some provisions of the GIPA Act relevant to this report are unsatisfactory in relation to their intersection with privacy legislation (particularly the *Privacy and Personal Information Protection Act 1998* (NSW) (“PPIPA”). Where this is so, we have not hesitated to recommend that the GIPA Act should, in relevant respects, be amended or repealed. In doing so, we must stress that we have borne in mind that the GIPA Act is new legislation that seeks to achieve articulated objectives in opening government information to the public.¹³ Our recommendations seek, wherever possible, to further these objectives without compromising privacy protection in NSW.

1.7 Thirdly, there are many uncertainties and contingencies that currently affect the relationship between FOI and privacy legislation. These centre, in particular, on the future of privacy law in this State, which is unclear. In our review of privacy law, we have stressed the desirability of, and the need for, uniform privacy laws in Australia.¹⁴ Uniformity was also a key feature in the reforms of privacy law recommended by the Australian Law Reform Commission (“ALRC”) in 2008.¹⁵ The Australian Government has accepted in principle the need for uniformity of privacy laws in Australia.¹⁶ Our recommendations in this report take account not only of the relationship between existing and

12. See Chapters 3 and 4.

13. See GIPA Act s 3.

14. See NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009), [11.1]-[11.3]; NSW Law Reform Commission, *Privacy Principles*, Report 123 (2009) [0.10]-[0.13].

15. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) especially ch 3.

16. See Australian Government, *Enhancing National Privacy Protection*, Australian Government First Stage Response to the Australian Law Reform Commission Report 108 *For Your Information: Australian Privacy Law and Practice* (October 2009) 21.

future FOI and privacy regimes in NSW, but also how that relationship should be defined in a system of uniform laws that, essentially, gives effect to the recommendations of the ALRC in its 2008 report. It is, of course, for the NSW government to decide whether or not any recommendations we make in this report should be implemented, and, if so, whether such implementation should wait until the federal government has taken legislative action in this area.

SUBMISSIONS AND CONSULTATIONS

1.8 As indicated, this report is part of our broader inquiry into privacy law. Some of the issues raised in the additional terms of reference were canvassed in our Consultation Paper, *Privacy Legislation in New South Wales*, which was published in 2008.¹⁷ In responding to our additional terms of reference, we have drawn on the responses that we received to that Paper.¹⁸

1.9 In response to the additional terms of reference, we published a short paper in 2009, *Privacy and Access to Personal Information: Points For Discussion*.¹⁹ We invited, and received, submissions on that paper. We also consulted with representatives of various government agencies and other stakeholders.²⁰ These enabled us to get an understanding of how the various Acts operate in practice, and the problems that need to be addressed.

STRUCTURE OF THIS REPORT

1.10 Chapter 2 of this report gives detailed consideration to the meaning of “personal information” under both privacy legislation and the GIPA Act. The expression is central to both legislative regimes, and needs to have a common meaning if the two regimes are to operate seamlessly in practice. For this reason, we moved into this report the treatment of

17. NSW Law Reform Commission, *Privacy Legislation in New South Wales*, Consultation Paper 3 (2008) (“CP 3”).

18. For a list of submissions to CP 3, see Appendix D.

19. See <[http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/misc004.pdf/\\$file/misc004.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/misc004.pdf/$file/misc004.pdf)>. See also Public Interest Advocacy Centre, *Submission*, 6.

20. For a list of consultations and submissions, see Appendix C.

“personal information” that was destined for inclusion in our final report on the law of privacy in NSW.²¹

1.11 Chapter 3 looks at access to and amendment of personal information. This throws up the following conflict between PPIPA on the one hand, and the GIPA Act and its predecessor, the FOI Act, on the other. First, an individual may seek access to and amendment of his or her own personal information under both PPIPA and the GIPA Act or the FOI Act. The procedures are however different under each Act and this causes confusion in practice. An issue arises as to whether all applications for access to and amendment to personal information should be dealt with exclusively by one Act.

1.12 A second source of conflict between the Acts arises when an individual seeks access to personal information of a third party. The GIPA Act, and before it the FOI Act, may permit disclosure while PPIPA might prevent disclosure for privacy reasons. Chapter 4 looks at the privacy exemption under the FOI Act, and the case law arising under it, as well as the position under the GIPA Act. The Chapter considers how it might be possible to amend the legislation to accommodate privacy concerns, and to ensure that PPIPA and the GIPA Act operate consistently.

1.13 Finally, Chapter 5 considers the application to public officers of the principles discussed in this report.

21. NSW Law Reform Commission, *Protecting Privacy in New South Wales* (2010).

2. **Personal information**

- Introduction
- Defining personal information
- Personal information and privacy principles
- Exceptions to the definition of personal information

INTRODUCTION

2.1 An understanding of the meaning of “personal information” is critical to the operation of a number of Acts relating to access to information.

2.2 First, under the *Privacy and Personal Information Protection Act 1998* (NSW) (“PPIPA”), a public sector agency that holds personal information must, at the request of the individual to whom the information relates, provide access to that information.¹ Secondly, it is only information that falls within the definition of “personal information” that is protected by the Information Protection Principles (“IPPs”) in PPIPA. Thirdly, under the *Health Records and Information Privacy Act 2002* (NSW) (“HRIPA”), “personal information” is an element in the definition of “health information”, which is subject to the Health Privacy Principles (“HPPs”).² Finally, under the new *Government Information (Public Access) Act 2009* (NSW) (the “GIPA Act”), which replaces the *Freedom of Information Act 1989* (NSW) (the “FOI Act”), there is a public interest consideration against disclosure of information if disclosure could reasonably be expected to reveal an individual’s personal information.³ If that consideration outweighs the public interest considerations in favour of disclosure, there is said to be an overriding public interest against disclosure.⁴

2.3 At present, there is a major difference between the definitions of “personal information” in PPIPA and the GIPA Act. Although the basic definition is the same in both Acts, in PPIPA there are 12 exceptions from the definition, whilst in the GIPA Act there are only three exceptions, two of which are also to be found in the list of exceptions in PPIPA.⁵

2.4 This Chapter considers the meaning of the expression “personal information” in the contexts of PPIPA and the GIPA Act. It also evaluates the exceptions to the definitions of it in those contexts. It ascertains

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1. *Privacy and Personal Information Protection Act 1998* (NSW) (“PPIPA”) s 14.
 2. *Health Records and Information Privacy Act 2002* (NSW) s 5 (defining “personal information”) and s 6 (defining “health information” as a particular kind of personal information).
 3. *Government Information (Public Access) Act 2009* (NSW) (“GIPA Act”) s 14 Table item 3(a).
 4. GIPA Act s 13.
 5. See para 2.62.

whether the same definition should be used in both Acts, and whether there is any justification for the exceptions to the definition included in each Act.

DEFINING PERSONAL INFORMATION

The statutory provisions

2.5 Section 4(1) of PPIPA defines “personal information” as follows:

[I]nformation or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.

Section 4(2) provides that the expression “includes such things as an individual’s fingerprints, retina prints, body samples or genetic characteristics”.

There is then a list in s 4(3) of 12 exceptions from the definition.⁶

2.6 Section 5 of HRIPA adopts an identical definition of “personal information”, but lists fifteen exceptions.

2.7 The GIPA Act defines “personal information” as follows:⁷

[I]nformation or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion.

Except that it spells out that information can be about a living or dead individual (which is implied in PPIPA),⁸ the definition is identical to that in PPIPA. Like PPIPA, it also specifies that the definition includes an individual’s fingerprints, retina parts, body samples and genetic

6. See para 2.62-2.91.

7. GIPA Act sch 4 cl 4(1).

8. Because PPIPA s 4(3)(a) excludes information about an individual who has been dead for more than 30 years from the definition of “personal information”.

characteristics.⁹ Unlike PPIPA, the GIPA Act lists only 3 exceptions to the definition.¹⁰

The interpretation of the statutory provisions

2.8 The definitions of personal information in NSW legislation are very similar to, and have their origin in,¹¹ the definition of “personal information” in s 6 of the *Privacy Act 1988* (Cth). The Privacy Act evolved in response to a report by the Australian Law Reform Commission (“ALRC”) in 1983.¹² The ALRC stated, in relation to the expression “personal information” that “[a]ny information about a natural person should be regarded as personal information”, and that “information should be regarded as being ‘personal information’ if it is information about a natural person from which, or by use of which, the person can be identified”.¹³ The Second Reading Speech notes that, for the purposes of the Act, “[p]ersonal information’ is widely defined to include anything – act, true or false, or opinion – that reasonably identifies an individual”.¹⁴

2.9 Case law supports the view that “personal information” means any information about a natural person,¹⁵ rendering the types of information that are capable of falling within it “limitless”.¹⁶ Thus, “personal information” is not confined to “information concerning the personal affairs of any person”, the narrower phrase used in the FOI Act.¹⁷ For

9. GIPA Act sch 4 cl 4(2).

10. GIPA Act sch 4 cl 4(3). See para 2.62.

11. See *Vice-Chancellor Macquarie University v FM* [2005] NSWCA 192, [23]-[24].

12. ALRC, *Privacy*, Report 22 (1983).

13. ALRC, *Privacy*, Report 22 (1983) vol 2, 82.

14. Commonwealth, *Parliamentary Debates*, House of Representatives, 1 November 1988, 2117 (Hon Lionel Bowen, Attorney-General).

15. Note that the NSW Court of Appeal has stated that PPIPA is legislation that must be liberally interpreted to achieve its beneficial purpose: *Department of Education and Training v MT* (2006) 67 NSWLR 37, [49]. See also *WL v Randwick City Council* [2007] NSWADTAP 58, [22] (particularising the point to PPIPA s 4).

16. J Douglas-Stewart, *Annotated National Privacy Principles* (3rd ed, Presidian Legal Publications, 2007) [1-730].

17. *WL v Randwick City Council* [2007] NSWADTAP 58, [20]. See also *Re Pfizer and Department of Health, Housing and Community Services* (1993) 30 ALD 647, [77]-[78] (noting the affect of the change from “information relating to the personal affairs of” to “personal information about” in the 1991 amendment of the *Freedom of Information Act 1982* (Cth) s 41).

example, to identify a public official in connection with his public responsibilities is not to reveal “information concerning his personal affairs”, while it is “personal information”.¹⁸ Nor does the adjective “personal” mean that information must be of a private, intimate or sensitive character to fall within “personal information”.¹⁹

2.10 Rather, in determining whether certain information constitutes personal information, “[i]t is the identity which is apparent, or can reasonably be ascertained about an individual from the information or opinion that is relevant.”²⁰ Thus, “personal information” does not extend to information about a department or agency, but must refer to an individual who can be identified.²¹ Whether it does so or not is determined both from content and from context. A letter of complaint to a Council by A about B may contain personal information about both A and B;²² “[d]ocuments which themselves do not contain any obvious features identifying an individual may take on the quality by virtue of the context to which they belong”;²³ and photographs of building works taken in circumstances where the photographer knows the owner’s identity may, in all the circumstances, arguably constitute personal information.²⁴ Moreover, “if the identity is apparent or can be reasonably ascertained from a telephone number or other material, then such material would fall within the section”.²⁵

2.11 “Personal information” must, however, reveal something *about* that individual. There may, for example, be circumstances in which the disclosure of a person’s name does not reveal anything about that person,

18. *WL v Randwick City Council* [2007] NSWADTAP 58, [20], distinguishing *Commissioner of Police v District Court of NSW (Perrin’s case)* (1993) 31 NSWLR 606.

19. *NW v New South Wales Fire Brigades* [2005] NSWADT 73, [11].

20. *Re Pfizer and Department of Health, Housing and Community Services* (1993) 30 ALD 647, [78]. See also M Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State* (LexisNexis Butterworths, 2005) [6.6].

21. *Kristoffersen v Department of Employment Workplace Relations and Small Business* [2002] FCA 55, [25].

22. See *NV v Randwick City Council* [2005] NSWADT 45.

23. *WL v Randwick City Council* [2007] NSWADTAP 58, [15].

24. *WL v Randwick City Council* [2007] NSWADTAP 58.

25. *Re Pfizer and Department of Health, Housing and Community Services* (1993) 30 ALD 647, [80]. See also *WL v La Trobe University* [2005] VCAT 2592.

as, perhaps, where the person's name only appears in a document as its author and lists the author's position within the organisation issuing the document.²⁶ However, as a person's name is generally a primary form of identification of that person, its disclosure will usually amount to a disclosure of personal information, as, for example, where a person's name is included on a list of persons who suffer from dementia,²⁷ or on a work roster that reveals the person's work activities.²⁸

Uncertainties in the statutory provisions

2.12 Consultation Paper 3 ("CP 3") drew attention to a number of uncertainties that are thought to surround the meaning of "personal information" by reason of the way in which the definitions are formulated in PPIPA and HRIPA,²⁹ in particular:

- whether photographs and video images can constitute personal information; and
- the meaning of "or can reasonably be ascertained from the information or opinion" in the definition.

Photographs and video images

2.13 It is obvious that an individual's identity may be apparent, or could reasonably be ascertained, from photographs and other visual images of the individual, and that such photographs or images can reveal information about the individual – for example, where he or she was on a particular day. Such images are, therefore, clearly capable of falling within the definition of "personal information". This is recognised in case law. In *SW v Forests NSW* the ADT held that digital photographs of SW taken in private circumstances, stored electronically on an office computer and distributed on CDs were personal information, in respect

26. Consider *Re Strang and Department of Immigration and Ethnic Affairs* (1994) 36 ALD 449, [49].

27. M Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State* (LexisNexis Butterworths, 2005) [6.6].

28. Consider *NW v New South Wales Fire Brigades* [2005] NSWADT 73, [8]-[14]. Compare *Re Russell Island Development Association Inc and Department of Primary Industries and Energy* (1994) 33 ALD 683, [43]-[45]; *Re Subramanian and Refugee Review Tribunal* (1997) 44 ALD 435, [44].

29. See NSW Law Reform Commission, *Privacy Legislation in New South Wales*, Consultation Paper 3 (2008), [5.7]-[5.50] ("CP 3").

of which there had been a breach of several IPPs.³⁰ Doubts about a result such as this arise because of the perceived difficulty of applying some of the IPPs in PPIPA to visual images – for example, the requirement that the information be collected directly from the individual or that personal information be subject to amendment at the instance of the individual to whom it relates.³¹

2.14 In principle, we agree with all those who made submissions on this issue: information in photographs and video images naturally comes within, and should be capable of coming within, the general definition of “personal information” in privacy legislation.³² No implication to the contrary should be drawn from the IPPs. First, the case law cited in the last paragraph makes it clear that most of the current IPPs in PPIPA are capable of applying to visual images. Secondly, we are satisfied that the Unified Privacy Principles (“UPPs”) recommended in our report on privacy principles apply without difficulty to visual images.³³ Thirdly, it is undesirable that the definition of personal information should refer specifically to information obtained from visual images. There is always a danger that implications may be drawn from such specification either to narrow the general definition of “personal information” or to obscure the fact that whether or not visual images do amount to personal information is, like all information, dependent on context.³⁴ Fourthly, it seems very old-fashioned to spell out that photographs and visual images are capable of conveying “personal information”. It surely goes without saying.

Meaning of “or can be reasonably ascertained from the information or opinion”

2.15 The definition of “personal information” in s 4(1) of PPIPA provides that it means information about an individual whose identity is apparent “or can reasonably be ascertained from the information or opinion”.

30. *SW v Forests NSW* [2006] NSWADT 74. See also *WL v Randwick City Council* [2007] NSWADTAP 58.

31. Inner City Legal Centre, *Submission*, 29; NSW FOI/Privacy Practitioners Network *Submission*, 5; Law Society of NSW, *Submission*, 7. See also CP 3, [5.46]–[5.47].

32. Department of Education and Training, *Submission*, 11; Australian Privacy Foundation, *Submission*, 5; Cyberspace Law and Policy Centre, *Submission*, 12; Public Interest Advocacy Centre, *Submission*, 15; Privacy NSW, *Submission*, 7; Law Society of NSW *Submission*, 6; Office of the Privacy Commissioner, *Submission*, 7.

33. NSW Law Reform Commission, *Privacy Principles*, Report 123 (2009) chs 1-11.

34. Australian Press Council, *Submission*, 3.

2.16 The principal difficulty with this is that it suggests that the identity must be reasonably ascertained *only from* the information or opinion itself, not from a combination of that information or opinion and information obtained from other sources. A telephone number does not, without more, reveal the identity of any particular individual or anything about them. It may do so, however, if recourse is had to a directory or other source that links the number to a particular individual. The case law suggests that, in these circumstances, the telephone number should be capable of being “personal information”.³⁵ We agree with this, as did most of our submissions.³⁶ In our view, the definition requires redrafting to recognise that “personal information” is not necessarily restricted to what can be ascertained *from* the information or opinion in question. The redrafted definition of “personal information” in Recommendation 1 achieves this.

2.17 That redrafted definition still requires, however, that the information or opinion be about a “reasonably identifiable” individual. The element of reasonableness recognises that where an individual is only identifiable from particular information or an opinion if recourse is had to other information, that recourse must be legally possible and practically likely. If there is substantial cost or difficulty in linking the information, the individual may, in the circumstances, not be “reasonably identifiable”. The determination of this issue is necessarily dependent on fact and context, as it is in the current law.³⁷ For this reason, we do not believe that the phrase could usefully be clarified in legislation. We do, however, agree with the recommendation of the ALRC that the federal Privacy Commissioner should issue guidance on the subject.³⁸ Particularised to NSW, our view is that the NSW Privacy Commissioner should, after consultation with the federal Commissioner, develop and issue guidelines on the situations in which it can be said that an

35. *Re Pfizer and Department of Health, Housing and Community Services* (1993) 30 ALD 647 [80]; *WL v La Trobe University* [2005] VCAT 2592. See para 2.10.

36. Privacy NSW, *Submission*; Cyberspace Law and Policy Centre, *Submission to CP 3*, 13; Australian Privacy Foundation, *Submission to CP 3*, 5; Law Society of NSW, *Submission to CP 3*, 7.

37. See para 2.10.

38. See Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) vol 1 [6.63], Recommendation 6-2 (“ALRC, R 108”).

individual is “identified” or “reasonably identifiable”. Recommendation 2 gives effect to this.

Should the definition be redrafted?

The ALRC proposal

2.18 The ALRC has recommended that the federal Privacy Act should define “personal information” as “information or an opinion, whether true or not, and whether recorded in material form or not, about an identified or reasonably identifiable individual”.³⁹ In its response to the ALRC, the Australian Government has indicated its support for this definition of personal information.⁴⁰ The Government’s response notes that the proposed definition does not significantly change what is currently considered to be personal information. As the ALRC noted, most elements of the current definition of personal information are unproblematic.⁴¹ The wording it proposes does, however, more closely follow that in relevant international instruments.⁴²

2.19 The Government’s acceptance of the ALRC’s definition means that uniformity is, potentially, a strong argument in favour of its adoption in NSW privacy legislation. Independently of this consideration, we consider that, with one amendment, the definition proposed by the ALRC should be adopted in PPIPA and HRIPA, and that the definition of personal information in cl 4 of sch 4 of the GIPA Act should be amended so that it mirrors the definition exactly. The amendment we propose relates to the express application of the definition of “personal information” to individuals “whether living or dead”.

2.20 In principle, the primary definition of personal information in privacy legislation should be capable of reaching any information about an individual. It is because an individual may want to withhold or control the disclosure of – or at least to restrict the collection, use or circulation of – the information in question that the information is

39. ALRC, R 108, vol 1 Recommendation 6-1.

40. Australian Government, *Enhancing National Privacy Protection*, Australian Government First Stage Response to the Australian Law Reform Commission Report 108 *For Your Information: Australian Privacy Law and Practice* (October 2009) 24.

41. ALRC, R 108, vol 1 [6.50]-[6.51].

42. See ALRC, R 108, vol 1 [6.7]-[6.9].

justifiably treated as “personal”.⁴³ Context determines what information an individual may want to withhold from others and should, in the circumstances, be able to do so. The only necessary requirement is that the information identifies, or is reasonably capable of identifying, the individual.

An identified or reasonably identifiable individual

2.21 The ALRC’s definition overcomes the limitation of the current PPIPA definition that the identity of the individual must be reasonably ascertained from the information or opinion in question. The proposed definition accepts that it is possible that an individual may be reasonably identifiable when that information is combined with other information.⁴⁴

Information forming part of a database

2.22 The ALRC’s definition differs from the current definition in PPIPA, and the replica of that definition in the GIPA Act, by omitting reference to the fact that it includes “information forming part of a database”. Like the ALRC, we believe that, while a reference to “databases” may have been necessary at the time the legislation was passed, it now goes without saying that information can form part of a database.⁴⁵

Including information about individuals who are dead

2.23 The definition in the GIPA Act differs from that in PPIPA and that proposed by the ALRC in so far as it expressly applies to individuals “whether living or dead”. Both PPIPA and HRIPA do, however, impliedly protect the personal information of a dead person since their definition of “personal information” excludes “information about an individual who has been dead for more than 30 years”.⁴⁶ The ALRC identified strong policy reasons for extending some privacy protection to personal information about deceased persons, namely, “to ensure that living individuals are confident to provide personal information,

43. See the suggested definitions of “personal information” in R Wacks, *Personal Information: Privacy and the Law* (Clarendon Press, 1989) 26. See also the discussion of the concept by R Wacks in “Why there will never be an English common law privacy tort” in A Kenyon and M Richardson (eds.) *New Dimensions in Privacy Law, International and Comparative Perspectives* (Cambridge University Press, 2006) 154, 179-180. See further New Zealand Law Commission, *Protecting Personal Information From Disclosure*, Discussion Paper 49 (2002) [19].

44. See para 2.16.

45. ALRC, R 108, vol 1 [6.52].

46. PPIPA s 4(3)(a); HRIPA s 5(3)(a).

including sensitive information, in the knowledge that the information will not be disclosed in inappropriate circumstances after they die”; “to protect living relatives and others from distress caused by the inappropriate handling of a deceased individual’s personal information”; and, “to provide a right of access to that information for family members and others where such access is reasonable”.⁴⁷

2.24 Rather than extending the meaning of personal information, the ALRC recommended the adoption of a special regime dealing with the personal information of individuals who had been dead for less than 30 years.⁴⁸ This special regime would apply only to information held by organisations: information held by agencies would continue to be regulated by the *Freedom of Information Act 1982* (Cth) and the *Archives Act 1983* (Cth). While acknowledging the force of the arguments in favour of such a special regime, the Australian Government has rejected its adoption on the basis of “the significant constitutional limitations on the Commonwealth’s power to legislate in this area”.⁴⁹ Such limitations, founded on the restriction to living individuals of the relevant international law of privacy on which the Commonwealth’s powers depend,⁵⁰ do not, of course, apply in NSW.

2.25 We support Parliament’s recent decision expressly to extend the reach of “personal information” in the GIPA Act to individuals “whether living or dead”. The policy arguments identified by the ALRC and listed in the last paragraph argue in favour of such a decision, which has support among stakeholders.⁵¹ We can see no reason why PPIPA should not, consistently, reflect this approach in its general definition of “personal information” so that relevant privacy principles – such as those relating to collection, use and disclosure, data security and data quality – clearly apply to such information.

47. ALRC, R 108, vol 1 [8.3], [8.44].

48. ALRC, R 108, vol 1 Recommendations 8-1, 8-2, 8-3.

49. Australian Government, *Enhancing National Privacy Protection*, Australian Government First Stage Response to the Australian Law Reform Commission Report 108 *For Your Information: Australian Privacy Law and Practice* (October 2009) 28.

50. See ALRC, R 108, vol 1 [8.4]-[8.6], where the ALRC suggests, to avoid doubt, that the Commonwealth should seek a reference of powers from the States under s 51(xxxvii) of the Constitution.

51. ALRC, R 108, vol 1 [8.43] (reporting that stakeholders seem equally divided on the issue).

2.26 The ALRC regarded the extension of privacy protection to personal information about individuals who are dead through amendment of the definition of “personal information” as “problematic” for the reason that many of the privacy principles – for example, those that require notification to the individual whose personal information is in issue – could not apply, wholly or in part, to such information.⁵² We recognise that not all privacy principles are capable of application to the personal information of deceased individuals. Privacy legislation should, therefore, identify those privacy principles that do not apply to the personal information of individuals who are dead. Recommendation 3 identifies the IPPs, the HPPs and the UPPs (recommended in our report *Privacy Principles*)⁵³ that ought not to apply to the personal information of deceased individuals.

2.27 Recommendation 3 identifies, as one of the principles that ought not to apply to the protection of the privacy of deceased individuals, those relating to access. Access to personal information about individuals who have been dead for less than 30 years will be governed by the GIPA Act since the application necessarily relates to information about a third person (the deceased). Among other matters, the GIPA Act provides that where consultation is required concerning the release of personal information about a deceased person, that consultation is to occur with a close relative of the deceased.⁵⁴ A government record that contains personal information about individuals who have been dead for more than 30 years is subject to the open access provisions of the *State Records Act 1998* (NSW).⁵⁵

2.28 It should be noted that, notwithstanding some views to the contrary,⁵⁶ the deliberate use of the passive voice in the relevant sections

52. ALRC, R 108, vol 1 [8.34], [8.46].

53. See NSW Law Reform Commission, *Privacy Principles Report* 123 (2009) xix-xxxiii.

54. GIPA Act s 54(3). Compare *Freedom of Information Act 1989* (NSW) s 31(5).

55. See *State Records Act 1998* (NSW) pt 6.

56. See CP 3, [7.21]. A majority of those who made submissions in response to Issue 53 did not favour limiting the ability to make complaints to those whose privacy had been violated or to a person acting on their behalf: see Australian Privacy Foundation, *Submission to CP 3*, 13; Cyberspace Law and Policy Centre, *Submission to CP 3*, 31; Inner City Legal Centre, *Submission to CP 3*, 41; Public Interest Advocacy Centre, *Submission to CP 3*, 28. Compare: NSW FOI/Privacy

of PPIPA and HRIPA makes it clear that no statutory restriction is placed on the range of persons who can make a privacy complaint to the Privacy Commissioner.⁵⁷ Even if the ability to make a complaint is restricted to those who have some interest in the matter, those who are likely to complain about the breach of a privacy principle in relation to the personal information of a deceased person will be able to do so, including, for example, the deceased's spouse, partner, child, parent, sibling or legal personal representative.

Recommendation 1

Privacy legislation and clause 4(1) of schedule 4 of the GIPA Act should define "personal information" as "information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified or reasonably identifiable individual, whether living or dead".

Recommendation 2

In consultation with the federal Privacy Commissioner, the NSW Privacy Commissioner should develop and publish guidelines on the meaning of "identified or reasonably identifiable" in Recommendation 1.

Recommendation 3

Privacy legislation should specify the privacy principles that do not apply to the personal information of deceased individuals, namely, the principles in PPIPA s 9, 10, 11, 13, 14, 15; in HPPs 3, 4, 6, 7, 8, 12, 13; in UPPs 1, 3, 6, 9.

PERSONAL INFORMATION AND PRIVACY PRINCIPLES

The requirement that information be "held" by a public sector agency

2.29 The definition of "personal information" may, obviously, be limited in its application to particular privacy principles by the way in which the principle in question is expressed in legislation. A general

Practitioners Network, *Submission to CP 3*, 10-11; Privacy NSW, *Submission to CP 3*, 11.

57. See PPIPA pt 4 div 3; HRIPA pt 6.

limitation, which is found in a majority of the IPPs in PPIPA, is a requirement that information be “held” by a public sector agency. Section 4(4) of PPIPA provides that a public sector agency *holds* personal information where:

- the agency is in possession or control of the information, or
- the information is in the possession or control of a person employed or engaged by the agency in the course of such employment or engagement, or
- the information is contained in a State record in respect of which the agency is responsible under the State Records Act 1998 (NSW).⁵⁸

The decision in *Vice-Chancellor, Macquarie University v FM*

2.30 In *Vice-Chancellor, Macquarie University v FM*, the NSW Court of Appeal considered the meaning and implications of the requirement that an agency must “hold” personal information.⁵⁹ FM was a doctoral student at the University of New South Wales (“UNSW”). Before that, he had been a doctoral student at Macquarie University. FM complained that Macquarie University had disclosed to UNSW personal information about him contrary to s 18 of PPIPA, which provides that an agency that holds personal information about a person must not disclose it to another person or body unless certain conditions are met.⁶⁰

2.31 When reviewing his application for enrolment, UNSW approached Macquarie University for information about FM’s enrolment, including a copy of his academic transcript. Among the material provided to UNSW

58. PPIPA s 4(4).

59. *Vice-Chancellor Macquarie University v FM* [2005] NSWCA 192 (“FM”).

60. Section 18 provides that an agency that holds personal information must not disclose the information to a person or other body unless (a) the disclosure is directly related to the purpose for which the information was collected, and the agency disclosing the information has no reason to believe that the individual concerned would object to the disclosure, or (b) the individual concerned is reasonably likely to have been aware, or has been made aware in accordance with s 10, that information of that kind is usually disclosed to that other person or body, or (c) the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person. For full discussion of the disclosure principle, see NSW Law Reform Commission, *Privacy Principles*, Report 123 (2009) ch 5.

by Macquarie, with FM's authority, was a formal transcript that showed that FM's candidacy at Macquarie had been terminated for disciplinary reasons. A UNSW employee (A) subsequently sought more detailed information from Macquarie about the circumstances of the termination. A received the information orally from two Macquarie staff members (B and C), in three telephone conversations.

2.32 In the first telephone conversation, B told A that B did not have any documentation in relation to the termination, and that A should speak to C. In the second conversation, A spoke to C, the Head of the Department in which FM was enrolled. C told A about several reports of abuse and physical intimidation of other students by FM. In the third conversation, B told A about a series of incidents involving FM that he was aware of, including an incident (where FM was yelling at another student) which B had personally witnessed and intervened in.

2.33 Shortly afterwards, UNSW wrote to FM advising him that his enrolment had been cancelled. FM brought proceedings seeking external review by the ADT. The matter went on appeal to the Appeal Panel of the ADT, which held that the second and third conversations constituted breaches of s 18 of PPIPA.⁶¹

2.34 Macquarie University appealed successfully to the New South Wales Court of Appeal. Chief Justice Spigelman (with whom Justices Tobias and Brownie agreed) held that the issue before the Court was the proper construction of PPIPA,⁶² specifically, whether information obtained by visual or aural perception and held in the mind of an employee was "personal information" that was "held" within the meaning of s 18 of PPIPA.⁶³

2.35 The Court considered the definitions of, and exemptions to, personal information contained in s 4 of PPIPA and also the IPPs in s 8 to 19 of PPIPA concerning the collection, storage and handling of personal information. The Chief Justice placed particular emphasis on s 12-19, and the obligations contained therein upon an agency that "holds" personal information. He held that it was "overwhelmingly probable" that "holds"

61. *Vice-Chancellor, Macquarie University v FM (No.2)* [2004] NSWADTAP 37.

62. *FM*, [22].

63. *FM*, [25].

was used in the same sense in s 18 as it was in s 12-19.⁶⁴ He then stated that:

It is almost impossible to conceive how almost all of those other sections could operate in practice if they were intended to apply to information in the minds of employees acquired by direct visual or aural experience and never recorded in any manner.⁶⁵

For example, how could an agency comply with the requirements: to keep information only for no longer than necessary; to ensure secure disposal of the information; to safeguard the information against loss and unauthorised access, use, or disclosure; to provide access to it for the individual about whom it relates; to notify the individual of the collection of the information, the purpose of the collection and their rights to access it; or to ensure that the information is accurate, relevant, up-to-date and complete.

2.36 The Chief Justice then considered when personal information was “held” by an agency. As noted above, s 4(4) provides that personal information is held by an agency where it is in the possession or control of the agency or its employee. The Chief Justice held that the natural and ordinary meaning of those words did not extend to material held only in a person’s mind, as a person is neither in “possession” nor “control” of the contents of his or her mind.⁶⁶ Thus the Chief Justice concluded that the context of the legislative scheme that gives meaning to the words “holds personal information” in s 18 strongly indicates that the words did not extend to information held in the mind of an employee.⁶⁷

2.37 The Chief Justice expressly left open the question whether the same was true of the collection principles in PPIPA s 8-11. These principles deal with the collection of information by an agency, rather than with the principles that apply where an agency “holds” information. His Honour did, however, say that “[i]t seems likely that the scope of ‘personal information’ is the same for obligations relating to ‘collection’ as it is for those relating to ‘holding’ and ‘disclosure’”.⁶⁸

64. *FM*, [30].

65. *FM*, [28].

66. *FM*, [34].

67. *FM*, [40].

68. *FM*, [33].

2.38 Following the Court of Appeal’s decision, the ADT has held that information about a particular individual provided orally to a school teacher by his students was not within the “use” principles in s 16 and s 17 of PPIPA, as long as it was not reduced to a written record.⁶⁹ In another case the ADT held that where a government employee told the media that one of its clients was a troublemaker, an opinion not recorded anywhere, that did not constitute “disclosure” of personal information under s 18 of PPIPA.⁷⁰

Should privacy protection extend to personal information held in the mind of an employee of an agency?

2.39 The basal issue arising from the decision in *Vice-Chancellor, Macquarie University v FM* is the extent to which privacy legislation can, or should, protect personal information (whether for the purposes of privacy principles or for other purposes of the legislation) that is not held in a record but in the minds of employees of the agency. The Court of Appeal in *FM* itself clearly favoured the view that the application of privacy legislation should be restricted to information that is held in a written record, at least for the purposes of the application of privacy principles. We tentatively supported this view in our report on *Privacy Principles*,⁷¹ as did a majority of submissions.⁷²

2.40 The statutory review of PPIPA, conducted by the NSW Attorney General’s Department in 2007, recommended that the IPPs contained in s 12 to 16 of the Act should be expressly limited to personal information

69. *Director-General, Department of Education and Training v MT* [2005] NSWADTAP 77, [21].

70. *GR v Department of Housing (No.2)* [2005] NSWADT 301.

71. NSW Law Reform Commission, *Privacy Principles* Report 123 (2009) Recommendation 9.

72. Public Interest Advocacy Centre, *Submission*, 21; Privacy NSW, *Submission*, 3; Inner City Legal Centre, *Submission*, 15; Cyberspace Law and Policy Centre, *Submission*, 21; Australian Privacy Foundation, *Submission*, 8; NSW FOI/Privacy Practitioners Network, *Submission*, 2; Law Society of NSW, *Submission*, 10; NSW Department of Primary Industries, *Submission*, 1. The GIPA Act is generally consistent with this view in so far as it expressly provides that “knowledge of a person is not a record” for the purposes of the Act: see GIPA Act sch 4 cl 10(3), and para 2.49.

held in a material form.⁷³ The broad effect of this recommendation would be to apply the decision in *FM* to all the IPPs except those relating to the collection of information in s 8-11 of PPIPA. The NSW Government was of the view that this recommendation required further consideration in light of the reviews of privacy laws being undertaken by this Commission and the ALRC.⁷⁴

2.41 The reach of “personal information” in PPIPA obviously needs clarification. It is debatable whether Parliament intended PPIPA to apply to all personal information or opinion whether or not recorded. It is also debatable whether, as Chief Justice Spigelman concluded in *FM*, the inclusion of the words “whether or not recorded in material form” in the definition of “personal information” in PPIPA is intended simply to ensure the inclusion of electronic databases.⁷⁵ What is clear is that some privacy principles, including those relating to access and correction, cannot practically and sensibly apply to information that is held merely in the mind of an individual.

2.42 On the other hand, there may be strong arguments for extending privacy protection to such information in other contexts. Thus the obligations on agencies in respect of the collection of personal information (for example, the steps that must be taken to inform the individual about whom information is being collected concerning certain matters)⁷⁶ or the principles relating to data quality,⁷⁷ seem, in principle, to be applicable to information that is in the process of collection, even if it is not yet reduced to a record. Moreover, disregarding the limitations that flow from the requirement in PPIPA that the information must be “held” by the agency in question, there is no reason why the limits on the disclosure of personal information in issue in *FM* should not apply whether the information is reduced to a record or not.⁷⁸ The same comment can be made about the principle that imposes limits on the use

73. NSW Attorney-General’s Department, *Review of the Privacy and Personal Information Protection Act 1998*, Recommendation 14.

74. NSW Government, *Response to the Report on the Statutory Review of the Privacy and Personal Information Protection Act 1998*, 7.

75. *FM*, [27].

76. See PPIPA s 10.

77. Consider *M v Financial Institution* [2009] PrivCmrA 16 (dealing with NPP 3).

78. See PPIPA s 18.

of personal information.⁷⁹ Indeed, there is a danger that if such principles do not apply to information that is unrecorded, their application is easily avoided by employees of agencies simply communicating information about individuals orally without making a record.⁸⁰

Adopting the approach in the federal Privacy Act

2.43 The *Privacy Act 1988* (Cth) recognises that privacy legislation should not necessarily only protect personal information that is recorded. It draws a distinction between the collection of information and information that has been collected. The Act applies to personal information that has been collected only if it is held in a record. It applies to the collection of personal information only if the information is collected for inclusion in a record or a generally available publication.⁸¹ In the latter case, the reason for adding in “a generally available publication” is that the definition of “record” in federal legislation, whose substance is reproduced in the definition of “record” in Recommendation 5, excludes a “generally available publication”.⁸² There is, however, no reason why privacy legislation should not extend to the protection of information that is collected by an agency for inclusion in a record or a generally available publication.

2.44 The ALRC’s review of federal privacy law endorses the current provisions in the Privacy Act in this respect,⁸³ as does the response of the Australian Government to the ALRC’s review.⁸⁴ We have concluded that NSW privacy legislation should be in step with federal privacy law on an issue as central to privacy legislation as the scope of “personal information”.

79. See PPIPA s 17.

80. See Cyberspace Law and Policy Centre, *Submission to CP 3*, 22.

81. This derives from the wording of the IPPs in *Privacy Act 1988* (Cth) s 14 (comparing Principles 1-3 with Principles 4-11) and from s 16B in the case of the NPPs.

82. See para 2.54-2.56.

83. ALRC, R 108, vol 1 [6.123]-[6.155].

84. Australian Government, *Enhancing National Privacy Protection*, Australian Government First Stage Response to the Australian Law Reform Commission Report 108 *For Your Information: Australian Privacy Law and Practice* (October 2009) 26.

Recommendation 4

Privacy legislation should provide for its application to personal information that: (a) is collected for inclusion in a record or a generally available publication; or (b) is held in a record.

2.45 In arriving at Recommendation 4, we have borne in mind the following three matters.

Requiring that all personal information be recorded

2.46 First, we have taken account of the approach in the legislation in Tasmania⁸⁵ and Victoria,⁸⁶ which includes a requirement that information be recorded as one element of the primary definition of “personal information”. We agree with the ALRC that this approach is undesirable.⁸⁷ It risks excluding highly sensitive information that is often collected orally, for example, information about an individual collected orally by field officers of the Department of Community Services for inclusion in a record. Under the Tasmanian and Victorian models, this information is not protected until it is recorded. Under the *Privacy Act 1988* (Cth), however, the information is subject to the Act because it is collected for inclusion in a record, although it has not yet been recorded.

Application to the use and disclosure principles

2.47 Secondly, the adoption of the federal model in NSW means that, as in *FM*, the disclosure and use principles in s 17 and s 18 of PPIPA will not apply to information that has not been recorded, since the information will not be “held” in the relevant sense. However, the use and disclosure principle recommended in UPP 5 does not draw a firm distinction between the collection of information and information that has been collected, leaving open its application to unrecorded information that is collected for inclusion in a record. Moreover, the statutory cause of action for invasion of privacy recommended in our report on *Invasion of Privacy* would, in appropriate circumstances, reach unrecorded information where its publication amounts to an invasion of an individual’s privacy.⁸⁸

85. *Personal Information Protection Act 1995* (Tas) s 3 (“personal information” and “recorded format”).

86. *Information Privacy Act 2000* (Vic) s 3 (“personal information”).

87. ALRC, R 108, vol 1 [6.135].

88. See NSW Law Reform Commission, *Invasion of Privacy* Report 123 (2009) [5.1]-[5.57].

Pending the enactment of such a cause of action, we note that, if it satisfies the requirements of the doctrine of confidentiality, the publication of such information may give rise to an action for breach of confidence in equity,⁸⁹ and possibly under the Privacy Act.⁹⁰ Because the use of these actions involves greater legal formality and cost than a complaint to an agency and (if necessary) to the ADT, and because of the concerns already noted,⁹¹ we consider that any continued exclusion of unrecorded personal information from the disclosure and use principles should be kept under review to ensure that the objectives of privacy legislation are being met. The statutory review of the GIPA Act, which is to take place after a period of 5 years from the date of Assent, is an appropriate vehicle through which to address this (and some other issues) arising from this report. We address this in Recommendation 16(b).

The meaning of "record"

2.48 Thirdly, the amendment of privacy legislation in NSW to correspond with federal legislation requires a definition of the word "record" for the purposes of the legislation (including the application of the privacy principles). The word is defined in Part 6A of PPIPA, which deals with the correction of personal information. Part 6A will be inserted into PPIPA when the *Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009* (NSW), which transfers Part 4 of the FOI Act (dealing with the amendment of records) to PPIPA, is proclaimed. Section 59A(2) of PPIPA provides that words and expressions used in Part 6A "that are defined in the GIPA Act have the same meanings as in that Act". As "record" is defined in cl 10 of sch 4 to the GIPA Act, it will have the same meaning in the new Part 6A of PPIPA as it has in the GIPA Act.

89. See R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrine and Remedies* (4th ed, Butterworths, 2002) ch 41.

90. See *Privacy Act 1988* (Cth) pt VIII, whose repeal the ALRC has recommended: see ALRC Report 108 vol 1 [15.125]-[15.140] and Recommendation 15-3. The Australian Government has reserved its position on this recommendation pending its response to recommendations for a statutory cause of action for invasion of privacy: see Australian Government, *Enhancing National Privacy Protection*, Australian Government First Stage Response to the Australian Law Reform Commission Report 108 *For Your Information: Australian Privacy Law and Practice* (October 2009) 33.

91. See para 2.42.

2.49 Schedule 4 cl 10(1) of the GIPA Act defines “record” as “any document or other source of information compiled, recorded or stored in written form or by electronic process, or in any other manner or by any other means”.⁹² The clause is consistent with the result in *FM* in providing that the “knowledge of a person is not a record”.⁹³ The Act contains detailed provisions that clarify when a record is held by an agency;⁹⁴ identify which agencies hold particular records;⁹⁵ and make provision for what happens when an agency ceases to exist.⁹⁶

2.50 The most obvious difference between the definition of “record” in the GIPA Act and that in s 6 of the *Privacy Act 1988* (Cth) is that the definition in the *Privacy Act* lists six items that are not records for the purposes of that Act. However, as already noted, “record” has the same meaning in Part 6A of PPIPA as it has in the GIPA Act.⁹⁷ That meaning is not determined simply by reference to the basal definition of “record” in that Act. When read in the context of the GIPA Act as a whole, the meaning of “record” is similar to that of “record” in the *Privacy Act* in that the Act exempts records held by agencies to which the public generally has access,⁹⁸ or which are available for public inspection in an archive or library.⁹⁹ A specific provision in the GIPA Act bolsters this by allowing agencies to refuse to grant access to information that is already available to the applicant.¹⁰⁰

2.51 While the definition of record in the GIPA Act appears adequate for the purposes of that Act, it seems inappropriate to define the word in

92. *Interpretation Act 1987* (NSW) s 21 defines “document” as “any record of information, and includes: (a) anything on which there is writing, or (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or (d) a map, plan, drawing or photograph”.

93. GIPA Act sch 4 cl 10(3).

94. GIPA Act sch 4 cl 12.

95. GIPA Act sch 4 cl 13.

96. GIPA Act sch 4 cl 14.

97. See *Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009* (NSW) s 38A(2).

98. GIPA Act sch 4 cl 12(2). Compare *Privacy Act 1988* (Cth) s 6 (“record”(d)).

99. GIPA Act sch 4 cl 12(1)(c), (3), 13(3)-(4). Compare *Privacy Act 1988* (Cth) s 6 (“record”(e)-(g)).

100. GIPA Act s 59.

privacy legislation by reference to its meaning in the GIPA Act, especially as the reference is not simply to the definition in the GIPA Act but to the “meaning” that the word bears in that Act. This creates potential confusion and difficulty.¹⁰¹ Moreover, once the scope of privacy legislation has been limited to personal information in a record or collected for inclusion in a record (as in Recommendation 4), there is no reason why the word should not be defined generally for the purposes of that legislation, rather than, as sch 1 of the *Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009* (NSW) proposes, only for the purposes of the part of that legislation dealing with the amendment of records. In any event, our preferred position, set out in Recommendation 11, is that Part 6A of PPIPA should be repealed.

2.52 We recommend that the definition of “record” in privacy legislation in NSW should, as far as possible, be consistent with that in the *Privacy Act 1988* (Cth) (with which, as already argued, NSW legislation should aim to be uniform), and with that in the GIPA Act itself (which is the most recent Parliamentary expression of the word’s meaning). In our view, this is best achieved by reproducing the definition of “record” as it appears in sch 4 cl 10(1) of the GIPA Act, and adding the qualification from s 6 of the *Privacy Act 1988* (Cth) that the word does not include “a generally available publication”. Privacy legislation should also provide that a “generally available publication” does not include any publication or document declared by the regulations not to be a generally available publication for the purposes of the Act. Both HRIPA and PPIPA adopt this approach (though, in the case of PPIPA the reference is to “a publicly available document”). The power to exclude a “generally available publication” can be used to enhance privacy protection.¹⁰² It may also provide a ready means of ensuring that NSW privacy legislation remains uniform with that of the Commonwealth and other Australian jurisdictions in a uniform scheme. Current regulations under PPIPA exempt from the definition of personal information what are essentially

101. A narrow, but unpersuasive, reading of the GIPA Act sch 4 cl 10 is that it is exhaustive of the meaning of record by virtue of its heading. If there is any doubt in this respect, it argues in favour of our Recommendation 5 that “record” be defined in privacy legislation.

102. Compare that to excepting information from the definition of “personal information”, which reduces privacy protection and which we recommend be exercised only after consultation with the Privacy Commissioner: see Recommendation 9(b).

publicly available publications, and, in doing so, largely reflect provisions of the Commonwealth Privacy Act.¹⁰³

2.53 In reaching this recommendation we have had regard in particular to two matters:

- the difference between “publicly available” and “generally available publications”; and
- the desirability of excluding a “generally available publication” from a “record”.

2.54 **“Publicly available” and “generally available publications”.** We have considered whether there is any difference between a “publicly available publication” and a “generally available publication”. The first expression is used in PPIPA to describe information that is not “personal information”: the latter in HRIPA for the same purpose; and in the GIPA Act, as well as in the federal Privacy Act, to describe items that do not fall within the definition of “record”.

2.55 The essence of a “publicly available publication” is that a person must be able to come to the agency and be provided with the document, with no questions asked¹⁰⁴ and without restriction.¹⁰⁵ Whether members of the public have unrestricted access is a question of fact, to be decided on the evidence.¹⁰⁶ Unrestricted access does not, however, mean that access must necessarily be free of charge.¹⁰⁷ If a reasonable fee is charged for access, the publication can still be said to be a “publicly available publication”.¹⁰⁸ It is not clear, however, that a “generally available publication” can, as a matter of language, include a publication where a fee applies for access to it. We agree with the ALRC and the Office of the federal Privacy Commissioner that any definition of “generally available

103. See *Privacy and Personal Information Protection Regulation 2005* (NSW) cl 4 (a) and (b), and compare *Privacy Act 1988* (Cth) s 6 (record (e)-(g)). The source of the power for the specific regulations is found in PPIPA s 4(3)(k), which explains the reference to “publicly available document” where it last appears in the definition of “publicly available publication” in PPIPA s 3.

104. *WL v Randwick City Council* [2007] NSWADTAP 58, [26]-[27].

105. *NW v Fire Brigades (NSW)* [2005] NSWADT 73, [26]; *University of NSW v PC* [2008] NSWADTAP 26, [23].

106. *PC v University of New South Wales* [2007] NSWADT 286, [15]-[16].

107. See *WL v Randwick City Council* [2007] NSWADTAP 58, [27].

108. See *WL v Randwick City Council* [2007] NSWADTAP 58, [27]; *University of NSW v PC* [2008] NSWADTAP 26, [23].

publication” in privacy legislation should clarify that a publication is “generally available” whether or not a fee is charged for access to it.¹⁰⁹ Recommendation 6 gives effect to this.

2.56 A second issue is whether there is any difficulty in adopting in NSW privacy legislation the definition of “generally available publication” in s 6 of the *Privacy Act 1988* (Cth) as “a magazine, book, newspaper or other publication (however published) that is or will be generally available to members of the public”. In our view, there is not. The definition accords with the case law surrounding the meaning of “publicly available publication” in PPIPA. The ADT has held that such a publication must be “in a published form consistent with general, unfettered availability, such as a brochure, pamphlet or report”.¹¹⁰ Thus, where an agency contends that a document which on its face appears to be an internal administrative document is in fact a publicly available document (and therefore exempt from the protection of PPIPA), there must be convincing evidence, given that the consequence of a finding that information is contained in a publicly available publication is that an individual is deprived of the “important human rights protections” provided by PPIPA.¹¹¹

2.57 **Excluding “generally available publications” from “record”.** Apart from the desirability of achieving uniformity in this area of law, the issue arises as to whether or not it is appropriate to have a blanket exclusion of “generally available publications” from the definition of “record” in privacy legislation. The effect of the exclusion is potentially far reaching since, if the publication is generally available, the protections in privacy legislation do not apply. This is currently the position in NSW where “publicly available information” and “generally available information” is excluded from the definition of “personal information” in PPIPA and HRIPA respectively.

2.58 In Consultation Paper 3 we asked whether “publicly available information” and “generally available information” should be exempted

109. See ALRC, R 108, vol 1 [6.150]-[6.155] and Recommendation 6-7.

110. *WL v Randwick City Council* [2007] NSWADTAP 58, [27]. Compare *Own Motion Investigation v Bankruptcy Trustee Firm* [2007] PrivCmrA 5, where personal information about bankrupts was included on a website for the purposes of providing the information to creditors rather than to produce a generally available publication.

111. *NW v Fire Brigades(NSW)*[2005] NSWADT 73, [32].

altogether from the definition of “personal information” in those Acts, and whether the meaning of the expressions should be clarified in the legislation.¹¹² Some thought that the exemption should be maintained.¹¹³ Others argued forcefully that it should not.¹¹⁴ A number submitted that the definitions required clarification.¹¹⁵

2.59 The Public Interest Advocacy Centre (“PIAC”) submitted that sensitive or health information found in a publicly available publication should only be exempt from the IPPs if, on the face of the publication, the person clearly consented to the information being in the public domain.¹¹⁶ Privacy NSW referred to its 2004 submission to the statutory review of PPIPA, which stated that the breadth of the provision placed much of people’s personal information at risk of misuse without penalty. It recommended that the exception for publicly available information be removed, and replaced instead with an exemption from IPP 2 that would allow for the collection of publicly available information.¹¹⁷ That proposal was supported by a number of other submissions.¹¹⁸ Legal Aid NSW also submitted that agencies should be able to collect information from generally available publications, but that other privacy principles applying to use and disclosure, and the provisions on access and amendment should apply to the information that they collect.¹¹⁹

2.60 The UPPs proposed by the ALRC and adopted in our report on *Privacy Principles* address one of the concerns raised in submissions.¹²⁰ UPP 2 would allow an agency to collect personal information in certain circumstances from a source other than the individual whose information is in question, including, where reasonable, from a publicly available

112. CP 3, [5.11]-[5.21].

113. NSW Department of Education and Training, *Submission to CP 3*, 10; State Records Authority of NSW, *Submission to CP 3*, [2.2].

114. NSW FOI/Privacy Practitioners Network, *Submission to CP 3*, 3-4.

115. NSW Department of Education and Training, *Submission to CP 3*, 11; NSW FOI/Privacy Practitioners Network, *Submission to CP 3*, 4.

116. Public Interest Advocacy Centre, *Submission to CP 3*, 11.

117. Privacy NSW, *Submission to CP 3*, 5, referring to its *Submission to Review of the Privacy and Personal Information Protection Act 1998* (24 June 2004) 64.

118. Inner City Legal Centre, *Submission to CP 3*, 25; Cyberspace Law and Policy Centre, *Submission to CP 3*, 7; Australian Privacy Foundation, *Submission to CP 3*, 4.

119. Legal Aid NSW, *Submission to CP 3*, 4.

120. NSW Law Reform Commission, *Privacy Principles Report 123* (2009) xix-xxxiii.

source. Critically, however, the exclusion from “record” of a generally available publication means that UPP 5, which deals with the use and disclosure of personal information, would not apply to personal information held by an agency that is contained in a generally available publication. Where information is already publicly or generally available it will no doubt usually be difficult to argue that it ought to be subject to laws protecting privacy. However, as we pointed out in our report on *Invasion of Privacy*, information in the public domain may still be capable of remaining in the public sphere of an individual because of its practical obscurity – for example, because of the obstacles in the way of gaining access to it.¹²¹ We are of the view that agencies should not be able to use or disclose such information without reference to, at least, the privacy principles governing such use and disclosure. However, we note that submissions to the ALRC revealed few concerns in this respect;¹²² the laws of other jurisdictions tend to exclude generally available publications from the operation of privacy laws;¹²³ and it is possible that, in appropriate cases, a sufficiently obscure publication can be regarded as not “generally” available.

2.61 Our concerns are met in this respect if this issue is referred expressly for consideration to the statutory review of the GIPA Act that is to take place in the future when there has been experience with the hopefully uniform privacy laws that emerge from the recent reviews of privacy law in Australia (including this review) and their interaction with the new freedom of information legislation that is in the process of formation. Recommendation 16(c) gives effect to this.

Recommendation 5

Privacy legislation should define “record” to mean any document or other source of information compiled, recorded or stored in written form or by electronic process, or in any other manner or by any other means, except a generally available publication.

121. NSW Law Reform Commission, *Invasion of Privacy* Report 120 (2009) [5.28]. See also CP 3, [5.14]-[5.15].

122. ALRC, R 108, vol 1 [6.150]-[6.155].

123. For example, *Information Privacy Act 2000* (Vic) s 11(1)(a).

Recommendation 6

Privacy legislation should define “generally available publication” to mean a magazine, book, newspaper or other publication (however published) that is or will be generally available to members of the public, though not necessarily free of charge, but does not include any publication or document declared by the regulations not to be a generally available publication for the purposes of the legislation.

Recommendation 7

Section 59A(2) of PPIPA (as inserted by schedule 1 [3] of the *Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009*) should be qualified so that it does not apply to the definition of “record” in PPIPA.

EXCEPTIONS TO THE DEFINITION OF PERSONAL INFORMATION

2.62 As noted above, while PPIPA provides for some 12 exceptions to the definition of “personal information”, and while HRIPA has 15, the GIPA Act lists only three.¹²⁴ Two of the three are also contained in PPIPA and HRIPA, namely, information about an individual who has been dead for more than 30 years¹²⁵ and information about an individual of a class, or contained in a document of a class, prescribed by the regulations.¹²⁶ The GIPA Act excludes one further category not excluded in PPIPA or HRIPA, namely, information about an individual (comprising the individual’s name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions.¹²⁷

2.63 It is not clear from either the Second Reading Speech or the Explanatory Note to PPIPA or HRIPA what the rationale was for including such a long list of exceptions from the definition of “personal information”, and thus excluding much personal information from the application of the IPPs and HPPs. As noted above, the definition of

124. The only exception not considered in this section is that in HRIPA s 5(3)(n), which deals with a matter in the private sector that would be excluded from privacy legislation in NSW under proposed uniform laws: see NSW Law Reform Commission, *Privacy Principles* Report 123 (2009) [0.24]-[0.28].

125. PPIPA s 4(3)(a); HRIPA s 5(3)(a); GIPA Act sch 4 cl 4(3)(a).

126. PPIPA s 4(3)(k), HRIPA s 5(3)(o); GIPA Act sch 4 cl 4(3)(c).

127. GIPA Act sch 4 cl 4(3)(b).

“personal information” in the *Privacy Act 1988* (Cth), on which the NSW provisions are based, does not contain any exceptions. Nor does the definition of “personal information” in the Victorian Act,¹²⁸ the Tasmanian Act,¹²⁹ the Northern Territory Act¹³⁰ or the new Queensland Act.¹³¹ We note, however, that legislation in other jurisdictions may achieve the same result as that in NSW legislation by other means, such as by excluding certain types of information from the definition of “record”,¹³² or through more general exemptions from the legislation.¹³³

2.64 An evaluation of the exceptions to the definition of “personal information” in NSW privacy legislation needs to be mindful that the result of the wholesale exclusion of particular information from the definition has the practical consequence of removing such information from the regulatory regime governing privacy, in particular from the application of privacy principles (such as the IPPs), with the potential results that:

- an individual cannot obtain access to their own personal information, or is unable to correct such information;
- the information can be freely disclosed or used; and
- the information can be collected, stored or retained without restriction.

2.65 A great deal of the information that is excepted from the definition of “personal information” in NSW privacy legislation relates to law enforcement and public or personal safety. At first glance, it seems odd to exclude such information from principles relating to security, use and disclosure in privacy legislation. Such information may, however, otherwise be inaccessible or at least subject to non-disclosure (or, perhaps, to other principles) by the force of other legislative regimes (such as adoption legislation),¹³⁴ or, more generally, because it is immune from

128. *Information Privacy Act 2000* (Vic) s 3.

129. *Personal Information Protection Act 2004* (Tas) s 3.

130. *Information Act 2002* (NT) s 4.

131. *Information Privacy Act 2009* (Qld) s 12.

132. As with the exclusion of “generally available publication” in the Commonwealth Act: see para 2.43.

133. On exemptions in Commonwealth legislation, see ALRC, R 108, vol 2 ch 33. Compare PPIPA pt 2 div 3.

134. See para 2.82.

disclosure under the GIPA Act as an overriding secrecy law,¹³⁵ or may be so immune if there is an overriding public interest against its disclosure in the circumstances.¹³⁶ In such cases the solutions provided by the other legislative regimes are likely to prevail,¹³⁷ as will the solution provided under the GIPA Act.¹³⁸ The exception of information relating to such matters from the definition of “personal information” in PPIPA seems unnecessary.

2.66 In any event, blanket exceptions of the type in s 4(3) of PPIPA are, generally, unjustified. It does not follow that, because it is determined that an individual should not have access to their own personal information, the information in question should be exempt from all privacy principles, such as those relating to the security and retention of the information. The general exemption relating to law enforcement and related matters in PPIPA provides an example: the exemption distinguishes between public sector agencies that are law enforcement agencies and those that are not; and then provides that the agencies so distinguished are not required to comply with certain of the IPPs in defined circumstances. That, in our view, is preferable approach to that of adopting blanket exemptions that, quite simply, do too much.¹³⁹

2.67 The recommendations that we have already made in this chapter have followed the approach in the new GIPA Act of striving for consistency in the definition of “personal information” in PPIPA, HRIPA and the GIPA Act. Our discussion below of the individual exceptions to that definition in the various Acts shows that, because the exceptions are largely unjustified, such consistency can also be obtained in the exceptions to the definition of “personal information” in each Act. Judge Ken Taylor, the NSW Privacy Commissioner and Acting NSW Information Commissioner, shares this view.¹⁴⁰

135. GIPA Act sch 1.

136. GIPA Act s 14 and Table.

137. For example, see para 2.82, 2.83, 2.89.

138. See para 2.84.

139. See Cyberspace Law and Policy Centre, *Submission to CP 3*, 7, 9, 11; FOI/Privacy Practitioners Network, *Submission to CP 3*, 4; Law Society of NSW, *Submission to CP 3*, 4. See also Privacy NSW, *Submission to the Review of the Privacy and Personal Information Protection Act 1998*, 24 June 2004.

140. Judge Ken Taylor, NSW Privacy Commissioner and Acting NSW Information Commissioner, *Submission*, 7.

2.68 There are eight general categories of exceptions to the definition of “personal information” in privacy legislation and the GIPA Act in NSW:

- (1) information about an individual who has been dead for more than 30 years;
- (2) information about an individual of a class, or contained in a document of a class, prescribed by the regulations;
- (3) information about an individual in a generally available, or publicly available, publication;
- (4) information about an individual in a document kept in a library, art gallery or museum for purposes of reference, study or exhibition;
- (5) information about an individual (comprising the individual’s name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions;
- (6) information about an individual’s suitability for appointment or employment as a public sector official;
- (7) information about an individual arising out of a Royal Commission or a Special Commission of Inquiry; and
- (8) information about an individual that is connected in some way to identified statutory provisions.

Individuals dead for more than 30 years and information prescribed by regulation

2.69 The first two exceptions are common to privacy legislation and the GIPA Act. In principle, we support both. The first exception aligns with the *State Records Act 1998* (NSW), which provides that State records are open to public access 30 years after they came into existence.¹⁴¹ It does, however, potentially provide greater protection to the personal

141. *State Records Act 1998* (NSW) pt 6, particularly s 50. See also Judge Ken Taylor, NSW Privacy Commissioner and Acting NSW Information Commissioner, *Submission, 7*; Office of the Privacy Commissioner, *Submission, 6-7*. See also para 2.89.

information of deceased persons than that in the *State Records Act* since it operates from the date of the death of the deceased, rather than from the time at which the record was created.

2.70 The second exception, the regulatory power to prescribe certain information, is a sensible method of responding to any unforeseen need that may develop to make a particular exception but that would not warrant the attention of Parliament. In this respect, the power to make regulations may also provide a mechanism for preserving or advancing uniformity with the law in other jurisdictions. However, to ensure that the power to issue regulations in this respect is properly exercised with full consideration of the effect of creating particular exceptions to the definition of “personal information” on the overall protection of privacy in NSW, it is our view that the power should only be exercised after consultation with the Privacy Commissioner, or, if the recommendation in our report on the *Offices of the Information and Privacy Commissioners* is implemented, the Information Commissioner.¹⁴² Recommendation 9(b) gives effect to this.

Generally available publications

2.71 The effect of Recommendations 4, 5 and 6 of this report is that a “generally available publication” would be an exception to the definition of “record”. The adoption of these recommendations will mean that there will be no need for “generally available publications” to be an exception to the definition of “personal information”. We also reiterate our concerns about the continuation of “generally available publication” as a blanket exception to the application of the principles of privacy legislation.¹⁴³

Documents in libraries, art galleries or museums

2.72 HRIPA excludes from the definition of “personal information” “information about an individual that is contained in a document kept in a library, art gallery or museum for the purposes of reference, study or exhibition”.¹⁴⁴ The *Personal Information and Privacy Information Protection Regulation 2005* (NSW) also excludes such information from “personal

142. See NSW Law Reform Commission, *The Offices of the Information and Privacy Commissioners*, Report 125 (2009) Recommendation 10.

143. See para 2.42.

144. HRIPA s 5(3)(c).

information” for the purposes of PPIPA.¹⁴⁵ Although we see no harm in retaining the exception in the regulations, we do not see any need for its express inclusion in the legislation, either as an exception to the definition of “personal information” or as an exception to the definition of “record”.¹⁴⁶ Such information is, in our view, adequately excepted as information in a “generally available publication”.

The name and non-personal contact details of persons engaged in the exercise of public functions

2.73 As we have already mentioned, to identify a person in connection with the exercise of his or her public functions is to reveal “personal information”.¹⁴⁷ The new exception to the definition of “personal information” in the GIPA Act means that agencies cannot refuse access to a document simply on the basis that it is “information about an individual (comprising the individual’s name and non-personal contact details) that reveals nothing more than that the person was engaged in the exercise of public functions”. While we do not take issue with this as a general (but narrow) proposition, we do see danger in framing the proposition as an exception to the definition of “personal information”. The danger is that once the information is classified as revealing “nothing more than the fact that the person was engaged in the exercise of public functions” it will be outside the Act and readily released, without appropriate regard being given to the other public interest considerations against disclosure (such as those relating to a risk of harm) that the circumstances of the case may require.¹⁴⁸ Moreover, by taking such information outside privacy legislation, the necessity to consult the person whose information is to be disclosed is removed.¹⁴⁹ This deprives the person of the opportunity to make known to an agency any legitimate concerns they may have about the disclosure of their name or non-personal contact details (even if these appear to reveal no more than that the person in engaged in the exercise of public functions).

145. *Personal Information and Privacy Information Protection Regulation 2005* (NSW) cl 4(a).

146. Similar exceptions to “record” appear in the *Privacy Act 1988* (Cth) s 6 (which may be wider), and to “government information” in the GIPA Act sch 4 cl 12(3). Again, these appear unnecessary.

147. See para 2.9.

148. See GIPA Act s 14 Table item 3(f).

149. See GIPA Act s 54(2)(a). See further para 4.49-4.50.

2.74 Recommendation 17 in chapter 5 (which considers the extent to which public interest, including privacy, considerations against disclosure ought to apply in respect of access applications for personal information about public officials) adopts an approach that gives effect to the essence of the exception in the GIPA Act sch 4 cl (3)(b), while avoiding the danger identified in the last paragraph. It does so by locating the exception in the context of the Table to s 14 of the GIPA Act, stressing that its force is as a factor relevant to the public interest against disclosure of information.¹⁵⁰

2.75 In our view, sch 4 cl (3)(b) of the GIPA Act should be repealed. Its repeal will mean that, in this respect, no difference exists in the exceptions to the definition of “personal information” in privacy legislation on the one hand, and in the GIPA Act on the other.

Recommendation 8

Clause 4(3)(b) of schedule 4 of the GIPA Act, which excepts from the definition of personal information “information about an individual (comprising the individual’s name and non-personal contact details) that reveals nothing more than that the person was engaged in the exercise of public functions”, should be repealed.

Suitability for appointment or employment as a public sector official

2.76 Both PPIPA and HRIPA exempt from the definition of “personal information” “information or an opinion about an individual’s suitability for appointment or employment as a public sector official”.¹⁵¹ One object of the exception may be to allow “free and frank discussion” during the processes of recruitment and promotion.¹⁵² However, on its face, the exception is not limited to such processes and it is capable of application to information about an employee after he or she has been appointed or employed. The ADT has held that the test for this exception is “whether, having regard to the content of the information in issue and the context in which it is found it can reasonably be said to be ‘about an individual’s

150. See para 5.13-5.15.

151. PPIPA s 4(3)(j); HRIPA s 5(3)(m).

152. See CP 3, [5.39].

suitability for appointment or employment’”.¹⁵³ The “protection against an over-reaching application of this exclusion is to be found in the word ‘suitability’. The information must be ... ‘about suitability’”.¹⁵⁴ Not every piece of information collected about a person in a personnel context will bear on the person’s “suitability”.¹⁵⁵ Moreover, as the Appeal Panel of the ADT has pointed out, the context must be current at the time when the information is collected,¹⁵⁶ and that context “must generally, if not invariably, be some kind of formal process that the relevant agency has instigated and is in the course of conducting”.¹⁵⁷

2.77 CP 3 raised the question whether the exception should expressly limit the context in which it applied.¹⁵⁸ While there was some support for the retention of the exemption and for its application to both prospective and current employees,¹⁵⁹ a majority of submissions favoured its amendment or removal. The Public Interest Advocacy Centre submitted that the exemption was very broad and open to abuse, and that it should be limited to the context of recruitment and promotion.¹⁶⁰ It also submitted that rather than a blanket exemption from all IPPs and HPPs, it would be preferable to have exemptions from specific IPPs and HPPs as necessary.¹⁶¹ Other submissions argued that the exemption should be limited to the recruitment context,¹⁶² and that employment records, which potentially contain a vast amount of personal information, should not be exempted from the IPPs and HPPs.¹⁶³ Some submitted that the whole

153. *Y v Director-General, Department of Education and Training* [2001] NSWADT 149, [33].

154. *Y v Director-General, Department of Education and Training* [2001] NSWADT 149, [36].

155. *Department of Education and Training v PN* [2006] NSWADTAP 66, [60].

156. *GL v Director-General, Department of Education and Training* [2003] NSWADT 166, [40]; *Department of Education and Training v PN* [2006] NSWADTAP 66, [62].

157. *Department of Education and Training v PN* [2006] NSWADTAP 66, [61].

158. CP 3, Issue 17.

159. NSW Department of Corrective Services, *Submission to CP 3*, 4.

160. Public Interest Advocacy Centre, *Submission to CP 3*, 13-14.

161. Public Interest Advocacy Centre, *Submission to CP 3*, 12.

162. NSW FOI/Privacy Practitioners Network, *Submission to CP 3*, 5; Law Society of NSW, *Submission to CP 3*, 6.

163. Privacy NSW, *Submission to CP 3*, 6-7; Inner City Legal Centre, *Submission to CP 3*, 28-9.

exemption should be removed,¹⁶⁴ and that there should be selective exemptions from particular IPPs and HPPs, such as those dealing with access, amendment and disclosure.¹⁶⁵

2.78 In our view, a blanket exception of this sort is unwarranted, however limited by context. In principle, there is no reason why information relating to an individual's suitability for appointment to or employment as a public sector official should not be accessible by the individual concerned, subject to the force of considerations such as confidentiality.¹⁶⁶ These considerations do not themselves justify exempting the term from the definition of "personal information". To do so would remove the general protections on access where the applicant is a third party. Moreover, we can see no reason why the collection, use, disclosure and security of such information should not be subject to the normal protection of privacy principles, particularly as articulated in the UPPs. To the extent to which the application of some privacy principles (for example, those relating to correction) may require modification or exclusion in their application to such information, this should be identified as an exception to the principle in question.

Royal Commissions and Special Commissions of Inquiry

2.79 In addition to excepting "information about an individual arising out of a Royal Commission or Special Commission of Inquiry" from the definition of "personal information", PPIPA also provides that nothing in it "affects the manner in which a Royal Commission or any Special Commission of Inquiry, exercises the Commission's functions".¹⁶⁷ This latter provision, which mirrors a provision relating to the exercise of judicial functions by a court or tribunal,¹⁶⁸ allows for the application to Royal Commissions and Special Commissions of Inquiry of such of the IPPs as are appropriate in the circumstances. This is fitting if it is borne in

164. Australian Privacy Foundation, *Submission to CP 3*, 5; HIV AIDS Legal Centre, *Submission to CP 3*, 11.

165. Cyberspace Law and Policy Centre, *Submission to CP 3*, 11-12.

166. Where disclosure of information would amount to a breach of confidence, non-compliance with PPIPA s 14 (IPP 7) is arguably permitted under PPIPA s 25(b), as would breach of a statutory provision requiring the information to be kept secret.

167. PPIPA s 6(2). See also HRIPA s 13(2).

168. PPIPA s 6(1), (3). See also HRIPA s 13(1), (3).

mind that such Commissions can be established for a variety of purposes and can utilise a diversity of processes and procedures. In any event, the legislation relating to, or the Letters Patent establishing, such Commissions may authorise the communication of information obtained in the course of the Commission's inquiries¹⁶⁹ or restrict its publication.¹⁷⁰ We do not, however, see any justification for the wholesale exclusion of privacy principles from information arising out of such Commissions.

Statutory exceptions

2.80 Both PPIPA and HRIPA contain a number of exceptions from the definition of "personal information" that identify information by reference to:

- a statutory program, namely witness protection¹⁷¹ and adoption;¹⁷²
- an action taken under a statute, namely, a warrant issued under the *Telecommunications (Interception and Access) Act 1979 (Cth)*;¹⁷³ an investigation arising out of a protected disclosure under the *Protected Disclosures Act 1994 (NSW)*;¹⁷⁴ an authorised operation under the *Law Enforcement (Controlled Operations) Act 1997 (NSW)*;¹⁷⁵ or a complaint under the *Police Act 1990 (NSW)*;¹⁷⁶
- an action protected by a statute, namely, "whistleblowing" under the *Protected Disclosures Act 1994 (NSW)*;¹⁷⁷
- archival information;¹⁷⁸ and
- Cabinet or Executive Council information under the GIPA Act.¹⁷⁹

2.81 We consider each of the statutory exceptions below.

169. For example, *Royal Commissions Act 1923 (NSW)* s 12A.

170. For example, *Special Commissions of Inquiry Act 1983 (NSW)* s 8.

171. PPIPA s 4(3)(c); HRIPA s 5(3)(f).

172. PPIPA s 4(3)(ja).

173. PPIPA s 4(3)(d); HRIPA s 5(3)(g).

174. PPIPA s 4(3)(e); HRIPA s 5(3)(h).

175. PPIPA s 4(3)(f); HRIPA s 5(3)(i).

176. PPIPA s 4(3)(h); HRIPA s 5(3)(k).

177. PPIPA s 4(3)(e); HRIPA s 5(3)(h).

178. HRIPA s 5(3)(d), (e); *Privacy and Personal Information Protection Regulation 2005 (NSW)* cl 4(c), (d).

179. PPIPA s 4(3)(i); HRIPA s 5(3)(l).

Adoption Act 2000 (NSW)

2.82 Chapter 8 of the *Adoption Act 2000* (NSW) and pt 11 of the *Adoption Regulation 2003* (NSW) (which is made pursuant to ch 8) provide a comprehensive scheme for dealing with “adoption information”, including criminal penalties for breach.¹⁸⁰ The GIPA Act provides a conclusive presumption against the disclosure of certain matters that relate to the Adoption Act.¹⁸¹ Even if the exception of ch 8 from the definition of “personal information” in PPIPA is removed, the statutory scheme provided in ch 8 will, as a matter of construction, continue to apply to adoption information that would otherwise have been subject to PPIPA (eg in respect of use and disclosure).¹⁸² To the extent to which PPIPA can apply to information not covered by ch 8 or rendered immune from disclosure under the GIPA Act, it is difficult to understand why the protection of privacy legislation should not apply to such highly sensitive information as relates to adoptions.

Copyright Act 1968 (Cth)

2.83 HRIPA and regulations to PPIPA except from the definition of “personal information” “information that is contained in archives within the meaning of the *Copyright Act 1968* of the Commonwealth”.¹⁸³ “Archives” there refers to archival material in the custody of the State Records Authority of New South Wales and like bodies in other Australian jurisdictions.¹⁸⁴ As with records available for public inspection under the *State Records Act 1998* (NSW),¹⁸⁵ we consider this exception unnecessary: the bodies concerned are governed by legislation that creates special regimes dealing with the handling of archival information

180. *Adoption Act 2000* (NSW) s 186.

181. GIPA Act sch 1 cl 9.

182. This is because the Adoption Act is later legislation dealing with specific personal information that, to the relevant extent, impliedly repeals the earlier PPIPA dealing with personal information generally: see D Pearce and R Geddes, *Statutory Interpretation in Australia* (6th ed, Butterworths, 2006) [7.20] (pointing out that this is not an application of the maxim that the general does not derogate from the special (*generalia specialibus non derogant*)). We believe this meets the concerns of the Department of Corrective Services, *Submission to CP 3*, 2.

183. HRIPA s 5(3)(e); *Privacy and Personal Information Protection Regulation 2005* (NSW) cl 4(c).

184. The State Records Authority of NSW is created by the *State Records Act 1998* (NSW) pt 7.

185. See para 2.89.

(including personal information) and that are unaffected by the general provisions dealing with personal information in privacy legislation.¹⁸⁶ The exception should only remain in regulations if it is thought desirable in the interests of certainty.

GIPA Act 2009 (NSW)

2.84 PPIPA excludes from the definition of “personal information” “information about an individual that is contained in Cabinet information or Executive Council information under the *Government Information (Public Access) Act 2009*”.¹⁸⁷ As there is a conclusive presumption that there is an overriding public interest against the disclosure of such information under the GIPA Act,¹⁸⁸ the point of the exception may be to fill a perceived gap: that the individual whose personal information is in question could access that information under PPIPA s 14. However, PPIPA contains three provisions, s 5, 20(5) and 25, whose effect would, in this context, be that the access provisions in the GIPA Act, and hence the GIPA Act solution, would prevail to exclude such access. The exception is, therefore, unnecessary. In Chapter 3, we note that these particular provisions, which are extremely obscure, require redrafting to make their meaning clear.¹⁸⁹

Law Enforcement (Controlled Operations) Act 1997 (NSW)

2.85 The *Law Enforcement (Controlled Operations) Act 1997* (NSW) provides that an authority may be granted to a law enforcement officer to conduct a controlled operation, meaning an operation conducted for the purpose of obtaining evidence of criminal activity or corrupt conduct; arresting a person involved in criminal activity or corrupt conduct; frustrating criminal activity or corrupt conduct; or carrying out any activity reasonably necessary to facilitate the achievement of any of these purposes.¹⁹⁰ Because the definition of “law enforcement agency” in this Act largely includes bodies that are either “law enforcement agencies” or

186. This is an illustration of the maxim that the general does not detract from specific (*generalia specialibus non derogant*): see D Pearce and R Geddes, *Statutory Interpretation in Australia* (6th ed, Butterworths, 2006) [7.19]-[7.20].

187. PPIPA s 4(3)(i), as inserted by the *Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009* (NSW) sch 1 cl 2.34 [1].

188. GIPA Act sch 1 cl 2, 3.

189. See para 3.82-3.87.

190. *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 5 (read with “controlled operation” in s 3).

“investigative agencies” under PPIPA,¹⁹¹ information about an individual arising out of, or in connection with, an authorised controlled operation is already exempted from the operation of some at least of the IPPs under the general exemptions from the principles in the Act that relate to law enforcement agencies and to investigative agencies.¹⁹² We consider this the appropriate way of exempting the law enforcement or investigative activities of agencies from the application of relevant IPPs.¹⁹³ Once this is done, it is difficult to see any need for excepting controlled operations from the definition of “personal information”.

Police Act 1990 (NSW) Part 8A

2.86 Part 8A of the *Police Act 1990* (NSW) makes provision for complaints of misconduct against a police officer by any person.¹⁹⁴ Information arising from a complaint is exempt from PPIPA if the information “results or proceeds from a complaint and is relevant to that complaint”.¹⁹⁵ Information “arises out of” a complaint only if it “results”, “proceeds” or “originates” from a complaint made under Part 8A,¹⁹⁶ not if it has an “indeterminate or tenuous” relationship with the investigation.¹⁹⁷

2.87 Section 169A of the *Police Act 1990* (NSW) prohibits the disclosure of the identity of a complainant under Part 8A to any person. This is an overriding public interest against disclosure under the GIPA Act.¹⁹⁸ To the extent of disclosure, therefore, the general exception of a complaint under Part 8A from PPIPA is unnecessary.¹⁹⁹ More generally, we agree with those who submitted that the exception should be removed from s 4(3) of PPIPA and included as a specific exemption in Part 2 of PPIPA,²⁰⁰

191. Compare *Law Enforcement (Controlled Operations) Act 1997* (NSW) s 3 (“law enforcement agency”) with PPIPA s 3 (“law enforcement agency” and “investigative agency”).

192. See PPIPA s 23, 24.

193. The general exemptions from privacy legislation will be considered in our final report in the privacy reference, *Protecting Privacy in NSW*.

194. *Police Act 1990* (NSW) s 122, 126.

195. *GA v Department of Education and Training and NSW Police* [2004] NSWADTAP 18, [55].

196. *KO v Commissioner of Police* [2004] NSWADTAP 21, [30].

197. *KO v Commissioner of Police* [2004] NSWADTAP 21, [32].

198. GIPA Act sch 1 cl 1.

199. See para 2.65.

200. Public Interest Advocacy Centre, *Submission to CP 3*, 12.

where it can be exempted from the application of relevant privacy principles.²⁰¹

Protected Disclosures Act 1994 (NSW)

2.88 The object of this Act is to facilitate the disclosure by public officials to certain authorities and others of corrupt conduct, maladministration and serious waste in the public sector by improving the procedures for such disclosure and protecting people from reprisals and any liability.²⁰² An authority to which a protected disclosure is made is prohibited from disclosing information that might identify or tend to identify a person who has made the protected disclosure except in limited circumstances,²⁰³ and there is a conclusive presumption against the disclosure of such information under the GIPA Act.²⁰⁴ While this provides protection against disclosure of the information and makes the exception unnecessary to this extent, the importance of protecting information disclosed under this Act can only be enhanced if that information is otherwise made subject to the protection of relevant privacy principles (such as those relating to the security of information), and excluded from those that may be inappropriate (such as those relating to collection).²⁰⁵

State Records Act 1998 (NSW)

2.89 HRIPA and the regulations to PPIPA exclude from the definition of “personal information” “information about an individual that is contained in a State record under the control of the State Records Authority that is available for public inspection in accordance with the *State Records Act 1998*”.²⁰⁶ This exception is unnecessary. While it is not on all fours with the exception of “information about an individual who has been dead for more than 30 years”,²⁰⁷ the exception relates, more generally, to a special regime for dealing with information (including

201. Cyberspace Law and Policy Centre, *Submission to CP 3*, 9; NSW/FOI Privacy Practitioners Network, *Submission to CP 3*, 4. Law Society of NSW *Submission to CP 3*, 5. Compare Australian Privacy Foundation, *Submission to CP 3*, 4 (which argued that all IPPs and HPPs should apply).

202. *Protected Disclosures Act 1994 (NSW)* pt 2, 3.

203. *Protected Disclosures Act 1994 (NSW)* s 22.

204. GIPA Act sch 1 cl 1.

205. See Inner City Legal Centre, *Submission to CP 3*, 28.

206. HRIPA s 5(3)(d); *Privacy and Personal Information Protection Regulation 2005 (NSW)* cl 4. See also *Privacy Act 1988 (Cth)* s 6 (“record” (f)), and the GIPA Act sch 4 cl 12,

207. See para 2.69-2.70.

personal information) that is unaffected by the general provisions dealing with personal information in privacy legislation. We do not, however, object to the exception remaining in regulations if it is thought desirable in the interests of certainty.

Telecommunications (Interception and Access) Act 1979 (Cth)

2.90 The federal Attorney-General, the Director-General of Security, an eligible judge or nominated member of the AAT may issue a warrant under this Act (the “Interception Act”) authorising the interception of telecommunications where they are satisfied that the telecommunications system is being or is likely to be used by persons for purposes or activities prejudicial to security.²⁰⁸ The Act contains detailed provisions relating to dealings with intercepted information and for the keeping and inspection of interception records.²⁰⁹ PPIPA excepts from “personal information” “information arising out of a warrant” issued under the Interception Act.²¹⁰ While this could conceivably cover information that is not regulated by the Interception Act itself, the general law enforcement exemptions in s 23 of PPIPA are likely to apply to such information, exempting it from specific IPPs.²¹¹ Moreover, a document containing information arising out of a warrant under the Interception Act is likely to be immune from disclosure as a document affecting law enforcement and public safety under the *Freedom of Information Act 1989* (NSW);²¹² while there is a public interest against its disclosure on grounds of law enforcement and security under the GIPA Act.²¹³ An access application under PPIPA would need to take this into account.²¹⁴ Given these protections, there is no necessity to maintain this exception.

Witness Protection Act 1995 (NSW)

2.91 A person who has given evidence for the Crown, given evidence about the commission of an offence or made a statement to police may be

208. *Telecommunications (Interception and Access) Act 1979* (Cth) s 9, 10, 46. Warrants may also be granted for access to stored communications under ch 3 of this Act.

209. *Telecommunications (Interception and Access) Act 1979* (Cth) pt 2-6, 2-7. See also pt 3-4, 3-5 (in relation to stored communications). See further ALRC R 108 vol 3 [72.7]-[72.9], [73.19]-[73.23].

210. PPIPA s 4(3)(d).

211. As would the use and disclosure principle proposed in UPP 5.1(c).

212. *Freedom of Information Act 1989* (NSW) sch 1 pt 1 cl 4.

213. GIPA Act s 14 Table item 2.

214. See PPIPA s 20(5); para 2.84.

placed under the witness protection program, which requires the Commissioner of Police to take necessary steps to protect the safety and welfare of witnesses by giving them, as necessary, a new identity, relocating them and providing financial assistance.²¹⁵ The Act prohibits the disclosure of certain information (particularly in relation to documents, such as birth certificates, issued for the purpose of establishing a new identity or re-establishing an old identity),²¹⁶ and there is an overriding public interest against the disclosure of such information under the GIPA Act.²¹⁷ While the exception in PPIPA from “personal information” of “information about a witness who is included in a witness protection program under the *Witness Protection Act 1995* or who is subject to other witness protection arrangements made under an Act”²¹⁸ extends beyond information whose publication is thus prohibited, that wider information would itself be subject to exemption from some specific IPPs in the general exemption in PPIPA relating to law enforcement.²¹⁹ Moreover, there would be a public interest against its disclosure on grounds of law enforcement and security under the GIPA Act,²²⁰ and an access application under PPIPA would need to take this into account.²²¹

Conclusion

2.92 For the reasons we have given, we believe that it is both unnecessary and undesirable for there to be such a long list of exceptions to the definition of “personal information” in PPIPA and HRIPA. The consequence is a considerable erosion of privacy protection, due to the wholesale exclusion of so many categories of information from the protection of the IPPs and HPPs. A further consequence is that an individual may be denied access, to which he or she would otherwise be entitled under s 14 of PPIPA, to many kinds of information.

2.93 The only exceptions to the definition of “personal information” which we support are:

215. *Witness Protection Act 1995* (NSW) s 3, 5.

216. *Witness Protection Act 1995* (NSW) s 22, 23.

217. GIPA Act sch 1 cl 1.

218. PPIPA s 4(3)(c).

219. PPIPA s 23.

220. GIPA Act s 14 Table item 2.

221. See PPIPA s 20(5); para 2.84.

- information about an individual who has been dead for more than 30 years; and
- information that is of a class, or is contained in a document of a class, prescribed by the regulations.

Recommendation 9

Privacy legislation (currently PPIPA s 4(3) and HRIPA s 5(3)) should provide that the only two exceptions to the definition of “personal information” are:

- (a) information about an individual who has been dead for more than 30 years; and
- (b) information of a class prescribed by the regulations, such regulations to be made only after consultation with the Privacy Commissioner or the Information Commissioner.

3.

Access to and amendment of personal information

- Introduction
- The current law
- The new law
- Clarifying the relationship between PPIPA and the GIPA Act

INTRODUCTION

3.1 Most public sector bodies in NSW are currently subject to both the *Freedom of Information Act 1989* (NSW) (“FOI Act”) and the *Privacy and Personal Information Protection Act 1998* (NSW) (“PPIPA”). Although both Acts provide rights of access to and amendment of personal information and privacy protection provisions, they have a different focus. As the Administrative Decisions Tribunal (“ADT”) has put it: “Privacy and data protection laws are intended to protect and promote the fair handling of personal information by agencies, whilst FOI laws are intended to promote open government in relation to handling of personal and non-personal information”.¹

3.2 The difference in focus produces two potential areas of overlap or conflict between the FOI Act and PPIPA.² The first is in relation to access to and amendment of personal information. A person may have rights under both Acts, and conflict arises due to the procedural and other differences between the different statutory regimes. This chapter deals with that issue. The second area of conflict or overlap concerns disclosure of third party personal information. Conflict arises when a document containing personal information of someone other than the applicant is subject to disclosure under the FOI Act but would be protected from disclosure under PPIPA, because its disclosure would invade the privacy of that third party. That is dealt with in Chapter 4.

THE CURRENT LAW

3.3 There are two principal competing and potentially conflicting regimes under which an individual may obtain access to and amendment of his or her personal information in NSW: by applying under PPIPA or under the FOI Act.

3.4 To complicate matters further, there are three other potential avenues of access to personal information in NSW. Where an individual seeks access to and amendment of health information, he or she may apply under the *Health Records and Information Privacy Act 2002* (NSW)

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1. *Ormonde v NSW National Parks and Wildlife Service* (No. 2) [2004] NSWADT 253, [56].
 2. M Paterson, *Freedom of Information and Privacy in Australia* (Butterworths, 2005) [1.47].

("HRIPA"). Where an applicant seeks access to personal information contained in documents held by a local council, he or she may apply under the *Local Government Act 1993* (NSW) ("LGA"). Finally, an individual may apply for access to "state records" under the *State Records Act 1998* (NSW) ("SRA").

3.5 What follows is a discussion of the different regimes under which an individual might seek access to and amendment of personal information, and some of the conflicts between them.

Access and amendment under the FOI Act

3.6 A person who seeks access to personal information in NSW may apply under the FOI Act, which provides a legally enforceable right to access to an agency's documents.³ The most recent figures available from the Ombudsman indicate that approximately 69.5% of all FOI applications in NSW in 2005-2006 were for documents containing information about the applicant's personal affairs.⁴ At the Commonwealth level, some 85% of all FOI applications were for personal information.⁵

3.7 Part 3 provides for the following regime. Applications for access must be in writing, accompanied by the required application fee.⁶ They must be dealt with within 21 days of receipt⁷ or there is a deemed refusal entitling the applicant to internal review,⁸ but there is provision for that period to be extended by 14 days in special circumstances.⁹ An applicant may elect for access to a document to be given in a particular form.¹⁰ An agency may refuse access on a number of grounds, including that a document is an exempt document.¹¹ An agency must give an applicant written notice of its determination, and, if access is refused, the reasons

3. FOI Act s 16.

4. NSW Ombudsman, *Audit of FOI Annual Reporting 2005-2006*.

5. *Freedom of Information Act 1982* (Cth) *Annual Report, 2007-2008*, 3.

6. FOI Act s 17.

7. FOI Act s 18(3).

8. FOI Act s 24(2).

9. FOI Act s 59B.

10. FOI Act s 27(2).

11. FOI Act s 25. Exempt documents are dealt with in sch 1.

for refusal, and the rights of review and appeal, and complaint to the Ombudsman.¹²

3.8 Where an applicant seeks access to personal information that “concerns the personal affairs” of any person, the agency must take such steps as are “reasonably practicable” to obtain that person’s views as to whether the document is exempt under cl 6 of sch 1. Clause 6 provides that a document is exempt if its disclosure would involve the unreasonable disclosure of information concerning the personal affairs of any person.¹³ If the agency decides to give access, despite objection from the third party, it must give the third party written notice of its decision, and of the rights of review by the ADT and complaint to the Ombudsman. Where an agency refuses access, a person has 28 days from notice of the determination to make written application for internal review.¹⁴ That review must be completed within 14 days or there is a deemed refusal of access.¹⁵

3.9 Some agencies in their submissions to the Commission stated that the meaning of “reasonably practicable” in s 31 was unclear, and suggested that it would be helpful to have more explicit guidance as to what steps should be taken.¹⁶ The Community Relations Commission emphasised the need to pay special attention to the needs of people from culturally and linguistically diverse backgrounds.¹⁷

3.10 Once a person has obtained access, he or she may apply for amendment if the document contains information concerning his or her personal affairs and that information is “incomplete, incorrect, out-of-date or misleading”.¹⁸ An application for amendment must be in writing.¹⁹ There is a deemed refusal to amend if an agency fails to determine an application within 21 days.²⁰ There is a provision for that

12. FOI Act s 28.

13. FOI Act s 31.

14. FOI Act s 34(2).

15. FOI Act s 34(6).

16. NSW Department of Community Services, *Submission*, 1.

17. Community Relations Commission, *Submission*, 1.

18. FOI Act s 39.

19. FOI Act s 40.

20. FOI Act s 41(3), 43(2).

period to be extended by 14 days in special circumstances.²¹ An agency must give written notice of its decision, including reasons if it refuses to amend.²²

3.11 If the agency refuses to amend, the applicant may apply in writing for internal review within 28 days of notice.²³ Failure by the agency to complete that review within 14 days is a deemed refusal to amend.²⁴

3.12 If an agency refuses access, or refuses an application to amend, the applicant may complain to the Ombudsman, who may conduct a review,²⁵ or the applicant may apply to the ADT for external review²⁶ within 60 days after notice of the determination.²⁷ Significantly, in any proceedings concerning a determination made by an agency, the agency bears the burden of establishing that the determination is justified.²⁸

Access and amendment under PPIPA

3.13 The alternative, and procedurally much less complex, path for a person seeking access to and amendment of their personal information is under PPIPA. The ADT has observed that

the right of access to personal information under the PPIP Act is more flexible than the right of access to documents provided under the FOI Act, and is able to support informal arrangements by agencies. This is consistent with the purpose of information privacy laws to provide a readily accessible mechanism for access to one's own personal information held by agencies. On the other hand, the more formal machinery of the FOI Act is primarily intended to serve the wider public interest in providing for third party access to documents relating to the workings of Government.²⁹

3.14 A public sector agency which holds personal information must take reasonable steps to allow a person to ascertain whether the agency

21. FOI Act s 59B.

22. FOI Act s 45.

23. FOI Act s 47(2).

24. FOI Act s 47(6).

25. FOI Act s 52, 52A.

26. FOI Act s 53.

27. FOI Act s 54.

28. FOI Act s 61.

29. *Ormonde v NSW National Parks & Wildlife Service (No 2)* [2004] NSWADT 253, [55].

holds personal information about the person and, if so, the nature of the information, the purposes for which it is used and the person's entitlement to gain access to the information.³⁰ An agency which holds personal information has an obligation to provide access, without excessive delay or expense, to the individual to whom the information relates.³¹ The agency has a further obligation, at that person's request, to make appropriate amendments to the information to ensure it is accurate, relevant, up-to-date and not misleading.³² If the agency is not prepared to make the amendments sought, it must attach to the information any statement provided by the individual of the amendment sought.³³

3.15 Applications for access or amendment need not be in writing, nor does the agency's determination have to be in writing. Unlike the FOI Act, there is no requirement for the application to be dealt with within a certain time.

3.16 If an agency, in breach of the information protection principles ("IPPs") in s 14 or 15 of PPIPA refuses to provide access or to make the amendments sought by an individual, he or she is entitled to both internal and external review. He or she may also complain to the Privacy Commissioner, who can conciliate.³⁴

3.17 First, the individual may apply in writing within six months for internal review by the agency.³⁵ That review must be completed within 60 days or the applicant is entitled to apply to the ADT for external review,³⁶ and the applicant must be notified in writing within 14 days of the findings and the right to review by the ADT.³⁷ The Privacy Commissioner must be informed of applications for internal review, and is entitled to make submissions.³⁸

30. PPIPA s 13.

31. PPIPA s 14.

32. PPIPA s 15(1).

33. PPIPA s 15(2).

34. PPIPA s 45.

35. PPIPA s 53(3).

36. PPIPA s 55(6).

37. PPIPA s 53(8).

38. PPIPA s 54.

3.18 If the person is not satisfied with the internal review, he or she may apply to the ADT for external review.³⁹ Again, the Privacy Commissioner must be notified and has a right to appear and be heard.⁴⁰ The ADT has broad powers to make orders, including the payment of damages.⁴¹

Comparison of the FOI and PPIPA regimes

3.19 As will be apparent from the above, there are significant differences between the regimes for access and amendment under the FOI Act and PPIPA.

3.20 As to access, some of the main differences are as follows:⁴²

- PPIPA applies to “personal information”,⁴³ while the FOI Act is limited to documents;⁴⁴
- PPIPA requires a public sector agency which holds personal information to provide access to the individual to whom the information relates,⁴⁵ whereas the FOI Act provides a broad right of access to all of an agency’s documents,⁴⁶ whether or not they relate to the applicant, subject to exemptions;
- the FOI Act requires that applications be in writing;⁴⁷ PPIPA does not;
- the FOI Act provides for an application fee,⁴⁸ but PPIPA does not;
- the agency may request an advance deposit under the FOI Act,⁴⁹ but not under PPIPA;

39. PPIPA s 55.

40. PPIPA s 55(7).

41. PPIPA s 55(2).

42. For a table setting out the differences between the two regimes, see C Puplick, ‘Privacy and Freedom of Information Legislation in NSW’ (2002) 9 *Privacy Law and Policy Reporter* 13. See also NSW Ombudsman, *Submission to the Review of the Privacy and Personal Information Protection Act 1998* (April 2004), Appendix B-1 “Navigating the Maze: A Guide to the Alternative Regimes For Access to Personal Information in NSW”.

43. PPIPA s 4.

44. FOI Act s 16.

45. PPIPA s 14.

46. FOI Act s 16.

47. FOI Act s 17(a).

48. FOI Act s 17(c).

- under the FOI Act an agency which fails to determine an application within 21 days is deemed to have refused it;⁵⁰ PPIPA contains no such provision;
- under the FOI Act an agency must give written notice of determination, and, if the application is to be refused, reasons and the findings on material questions of fact;⁵¹ the requirement in s 53(8) of PPIPA that there be notification in writing of findings is much less onerous;
- the FOI Act provides for consultation prior to release in certain circumstances,⁵² including, as noted above, where a document contains information concerning the personal affairs of any person;⁵³ PPIPA contains no such provision;
- the FOI Act provides for internal review within 28 days of notice of a decision⁵⁴ and failure to make that determination within 14 days is taken to be a refusal of access;⁵⁵ under PPIPA, the applicant has 6 months to apply for internal review;⁵⁶
- in relation to an application to review an access application (but not an amendment application) the FOI Act contemplates payment of a fee,⁵⁷ but PPIPA does not;
- there are differences in the procedures for external review under the FOI Act⁵⁸ and PPIPA.⁵⁹

3.21 The provisions in the FOI Act dealing with amendment are also much more comprehensive than the corresponding provisions in PPIPA.⁶⁰ Some of the differences are as follows:

49. FOI Act s 21.

50. FOI Act s 24(2).

51. FOI Act s 28.

52. FOI Act s 30-33.

53. FOI Act s 31.

54. FOI Act s 34.

55. FOI Act s 34(6).

56. PPIPA s 53(1)(d).

57. FOI Act s 34(2)(b).

58. FOI Act pt 5, s 52-58C.

59. PPIPA s 55 and 56. For a comparison of the two regimes, see appendices B-2 and B-3 of the NSW Ombudsman's *Submission to the Review of the Privacy and Personal Information Protection Act 1998* (April 2004).

- the FOI Act provides that a person may apply for the amendment of a document which contains information concerning the person's personal affairs,⁶¹ while PPIPA provides for the amendment of "personal information";⁶²
- the FOI Act requires an application to amend to be in writing;⁶³ PPIPA does not;
- under the FOI Act, a failure by the agency to determine an application within 21 days is a deemed refusal to amend;⁶⁴ there is no such provision under PPIPA;
- under the FOI Act, the agency must give an applicant written notice of its determination, with reasons if the application to amend is refused, the requirement under PPIPA is less onerous;⁶⁵
- under the FOI Act, the applicant has only 28 days from the date on which notice of determination was given to apply for internal review;⁶⁶ under PPIPA the applicant has six months;⁶⁷
- under the FOI Act, failure to determine the review within 14 days is deemed to be a refusal of access⁶⁸ or refusal to amend;⁶⁹ under PPIPA, if the review is not completed within 60 days the applicant may apply to the ADT for external review;
- under PPIPA, the agency must contact the Privacy Commissioner when it receives an application for internal review, and he or she is entitled to make submissions, or may, at the agency's request, undertake the review on its behalf;⁷⁰ there is no analogous provision in the FOI Act in relation to the Ombudsman;

60. FOI Act Part 4; PPIPA s 14.

61. FOI Act s 39.

62. PPIPA s 15.

63. FOI Act s 39(b).

64. FOI Act s 43(2).

65. FOI Act s 45.

66. FOI Act s 34(2)(e)(i) and s 47(2)(d)(i).

67. PPIPA s 53(3)(d).

68. FOI Act s 34(6).

69. FOI Act s 47(6).

70. PPIPA s 54.

- under the FOI Act, unlike under PPIPA, access must be granted to a document before application can be made for its amendment;⁷¹ and
- the exemptions are different.⁷²

3.22 The existence of alternative avenues for access to and amendment of personal information causes overlap and confusion. Because of the different regimes under the PPIPA and the FOI Act, an individual will be subject to different procedural requirements, and have different review rights, depending upon the Act under which the application is made.

3.23 It is arguable that where there is a conflict, the FOI Act prevails because of the combined operation of s 5 and s 20(5) of PPIPA. Section 5 provides that nothing in PPIPA affects the operation of the FOI Act. Section 20(5) provides that the provisions of the FOI Act that impose “conditions or limitations” with respect to any matter referred to in s 13, 14 or 15 of PPIPA “are not affected” by PPIPA and those provisions continue to apply as if they were part of PPIPA. The true meaning of s 20(5) is, however, far from clear. Does it mean that any application under PPIPA for access and amendment must comply with the detailed requirements in Parts 3 and 4 of the FOI Act? Does it mean only that the exemptions under the FOI Act apply to applications under PPIPA?

3.24 In our Consultation Paper, *Privacy Legislation in New South Wales*, we noted the lack of clarity in s 20 and proposed that this should be rectified.⁷³ A number of submissions supported this suggestion.⁷⁴

Access and amendment under other legislative regimes

The Health Records and Information Privacy Act 2002 (NSW)

3.25 A further avenue of access by an individual to personal information is under HRIPA. HRIPA is described in its long title as an Act “to make provision for the protection of health records and information”. The definition of “health information” in s 6 includes personal information (defined in s 5 in almost the same terms as the

71. FOI Act s 39.

72. FOI Act, sch 1; PPIPA s 22-28.

73. NSW Law Reform Commission, *Privacy Legislation in New South Wales* Consultation Paper 3 (2008) [6.33]-[6.35], [8.10], Proposal 13 (“CP 3”).

74. See Inner City Legal Centre, *Submission to CP 3*, 16; Privacy NSW, *Submission to CP 3*, 3; Cyberspace Law and Policy Centre, *Submission to CP 3*, 37; Australian Privacy Foundation, *Submission to CP 3*, 9.

PPIPA definition) about an individual's physical or mental health or disability. HRIPA deals exclusively with health information, to the exclusion of PPIPA.

3.26 Schedule 1 of HRIPA sets out 15 Health Privacy Principles ("HPPs") which apply to both public sector agencies and private sector persons. HPP 7 deals with access. It provides that an organisation that holds health information must provide access to it at the request of the individual to whom the information relates, and without excessive delay or expense. HPP 8 deals with amendment. It provides that the organisation must at the request of that individual make appropriate amendments to ensure that the health information is accurate and relevant, up to date, complete and not misleading.⁷⁵ Breaches by a public sector agency of an HPP are to be dealt with in the same way as breaches of an IPP under PPIPA.⁷⁶ Breaches by a private sector person are to be dealt with by the making of a complaint to the Privacy Commissioner⁷⁷ followed by an application to the ADT in certain circumstances.⁷⁸ Thus, in relation to public sector agencies, the same principles governing internal review and external review by the ADT apply, and the comments on the different regimes under the FOI Act and PPIPA apply also in this context.

3.27 Except for their exemption of non-compliance that is lawfully authorised or required or permitted by statute, the access and amendment regimes in HPPs 7 and 8 are similar to those in PPIPA, as is the relationship between HRIPA and the FOI Act.⁷⁹ All of the same difficulties and potential overlap discussed above in relation to PPIPA and the FOI Act apply here.

The Local Government Act 1993 (NSW)

3.28 The position becomes even more complex when an applicant seeks documents containing personal information from a local council, as there is then a third avenue available. Chapter 4 Part 2 of the *Local Government Act 1993 (NSW)* ("LGA") applies to access to information. Section 12(1) of the LGA provides that everyone is entitled to inspect the 29 categories of

75. Note that, in respect of a private sector person, there are specific provisions dealing with access and correction that are additional to and designed to assist the operation of the principles in HPPs 7 and 8: see HRIPA pt 4 div 3; pt 4 div 4.

76. HRIPA s 21.

77. HRIPA s 42.

78. HRIPA s 48.

79. HRIPA s 22.

documents listed therein free of charge. Section 12(6) provides that a council must allow inspection of its other documents free of charge unless it is satisfied that allowing inspection of a particular document would, on balance, be contrary to the public interest. Section 12(7) contains some exemptions to s 12(6). A right to inspect a document includes the right to take away a copy.⁸⁰

3.29 Since both the FOI Act and PPIPA apply to local councils, an applicant for access to documents containing personal information held by a council may thus proceed under any of the three statutes, each of which has a different regime. There is thus the potential for inconsistencies and for different outcomes depending on which Act an applicant chooses.⁸¹

3.30 There are significant differences between the FOI Act and the LGA. Some of the main ones are as follows:

- the LGA contains no privacy principles;
- a request must be in writing under the FOI Act⁸² but not under the LGA;
- Councils may charge a fee under the FOI Act⁸³ but not under the LGA;
- there are no provisions for amendment of records in the LGA;
- there are no provisions for consultation prior to release under the LGA;
- there is no provision for internal review of a Council's decision under the LGA; and
- there is no provision for external review in the LGA, unlike the provisions in Part 5 of the FOI Act for review by the ADT. The only redress under the LGA is for an applicant to bring proceedings in

80. *Local Government Act 1993* (NSW) s 12B(1).

81. For a table comparing the provisions of the FOI Act, PPIPA and the LGA, see NSW Ombudsman 1999/2000 Annual Report, Appendix "Navigating the maze – a guide to the alternative regimes for access to personal information in NSW". See also NSW Ombudsman, *Submission to the Review of the Privacy and Personal Information Protection Act* (April 2004).

82. FOI Act s 17(a).

83. FOI Act s 17(c).

the Land and Environment Court to remedy or restrain a breach of the LGA.⁸⁴

3.31 Like the FOI Act, the LGA provides for access to all documents, personal and non-personal. Unlike the FOI Act, there is no provision for the protection of an individual's privacy. Thus where an applicant seeks access to a document containing personal information concerning a third party, there might be a different result depending upon whether the application is made under the FOI Act or the LGA. Under the FOI Act, access might be refused on the grounds that disclosure would be unreasonable under sch 1 cl 6. Access might, however, be granted under the LGA if a Council is satisfied that allowing inspection would not be contrary to the public interest. The protection of an individual's privacy is thus potentially compromised by the LGA.

3.32 The potential for conflict between s 12 of the LGA and an individual's privacy is demonstrated in the recent decision of the ADT in *JS v Snow River Shire Council (No. 2)*.⁸⁵ In that case JS made a complaint, marked "private and confidential", to the Council about construction on the land of a third party. That complaint was placed on the Council's property file for that third party. When that third party inspected the Council's file, he requested, and was given a copy of JS's complaint. In response to the argument that this was a breach by the Council of its obligations under s 18 of PPIPA not to disclose JS's personal information, Council relied on s 25 of PPIPA, which provided that an agency is not required to comply with s 18 if it is lawfully authorised or required not to comply, or if non-compliance was otherwise permitted. It argued that s 12 of the LGA authorised or required non-compliance with s 18, or non-compliance was "otherwise permitted". The Privacy Commissioner filed submissions supporting that argument, noting that the interaction of PPIPA, the LGA and the FOI Act was "a matter of great legal difficulty".⁸⁶

3.33 The ADT upheld the Council's argument that it was exempted from complying with s 18 of PPIPA, holding that the document fell within s 12(6), which was a provision which "otherwise permitted" non-compliance with s 18.

84. LGA s 674.

85. *JS v Snow River Shire Council (No.2)* [2009] NSWADT 210.

86. *JS v Snow River Shire Council (No. 2)* [2009] NSWADT 210, [47].

The State Records Act 1998

3.34 According to its long title, the purpose of the SRA is to provide for the creation, management and protection of records of public offices of the State, and to provide for public access to those records.

3.35 Part 3 deals with protection of State records. Section 21 provides that a person must not abandon, dispose of, transfer ownership of, or damage or alter a State record. These provisions are important to the operation of the FOI Act in practice, because safe record-keeping facilitates access to documents. In fact the State Records Authority of NSW has recommended that s 12 of PPIPA, which provides that a public sector agency must ensure that personal information is kept no longer than necessary, and provides for secure disposal of that information, be amended to make it clear that it takes effect subject to s 21 of the SRA.⁸⁷ As we have pointed out elsewhere, the adoption of UPP 8 would make it clear that an agency's responsibilities under the SRA take precedence over any data destruction obligations.⁸⁸

3.36 Part 6 provides as follows for public access to State records after 30 years. It provides an alternative, cheaper right of access to documents that fall within its purview than that available under the FOI Act. Section 50 provides that a State record is in the open access period once it is at least 30 years old. Section 51(1) creates an obligation on public offices to ensure that documents in the open access period are the subject of an access direction providing either that they are open to public access (an "OPA direction") or closed to public access (a "CPA direction"). There is a presumption that State records in the open access period are open to public access.⁸⁹ Importantly, the fact that a record is not open to public access does not affect any entitlement to access under the FOI Act.⁹⁰

Submissions

3.37 In our consultation paper, *Privacy Legislation in New South Wales* ("CP 3"), we drew attention to the fact that the procedural differences

87. State Record Authority of NSW, *Review of Privacy Legislation in NSW*, (21 October 2008).

88. NSW Law Reform Commission, *Privacy Principles*, Report 123 (2009) [8.60]-[8.63].

89. SRA s 52.

90. SRA s 56.

between the two regimes have produced confusion and inconsistencies.⁹¹ We received a number of submissions as to possible amendments that might resolve the problems arising from the overlapping regulatory schemes.

3.38 Almost all submissions argued that the overlapping provisions should be rationalised, so that access to personal information was dealt with under the one statute, not, as is presently the case, under the FOI Act, PPIPA, and, for local council documents, also the LGA.

3.39 The Public Interest Advocacy Centre (“PIAC”) submitted that the right to access and amendment of a person’s personal information should be dealt with exclusively by PPIPA and that the corresponding provisions of the FOI Act and the *Local Government Act 1993* (NSW) should be repealed, because “the right to access and correct one’s personal information are fundamentally privacy rights that are more appropriately dealt with under privacy than under freedom of information legislation.”⁹²

3.40 There were a number of other submissions to the same effect. The Inner City Legal Centre (ICLC) submitted that all applications for access to and amendment of personal information should be under PPIPA, stating that this would “lessen confusion and ensure that privacy rights are protected under beneficial privacy legislation enacted for the specific purpose of privacy protection”.⁹³ The Cyberspace Law and Policy Centre also submitted that first-party access by an individual to personal information should be taken out of the FOI Act and left to PPIPA, and that s 12(6)-(8) of the LGA should be repealed.⁹⁴ Privacy NSW also submitted that the FOI Act should be amended so that first party access to and amendment of personal information should be through PPIPA.⁹⁵ The NSW FOI/Privacy Practitioners Network made the same submission. It also argued that the access provisions under s 12 of the LGA should be abolished.⁹⁶

91. CP 3, ch 8.

92. Public Interest Advocacy Centre, *Submission to CP 3*, 33.

93. Inner City Legal Centre, *Submission to CP 3*, 45.

94. Cyberspace Law and Policy Centre, *Submission to CP 3*, 37.

95. Letter from Privacy NSW to the NSW Law Reform Commission, 28 November 2008.

96. NSW FOI/Privacy Practitioners Network *Submission to CP 3*, 14.

3.41 Other submissions also argued that the access and amendment provisions of the FOI Act and PPIPA should be rationalised but submitted that applications for personal information should be made under the FOI Act, and not PPIPA.⁹⁷ A few suggested that the current dual regime continue to operate, but that both the PPIPA and the FOI Act be amended so that they better complement each other.⁹⁸

3.42 In response to our 2009 paper, *Privacy and Access to Personal Information: Points For Discussion*,⁹⁹ we received further submissions as to the confusion caused by the overlapping regimes.¹⁰⁰ There were further calls for access to personal information to be dealt with in the one piece of legislation.¹⁰¹ Again, the view was expressed that people wishing to access their own personal information should do so exclusively under PPIPA, and that those wishing to access other people's personal information should do so under the FOI Act or its successor, the GIPA Act.¹⁰² Others noted that while this might be conceptually neater, there would be problems in practice because applications seldom relate solely to the personal information of the applicant and it may, in any event, be difficult to determine which applications fall within this category.¹⁰³ It was suggested that access applications relating to health information be removed from the FOI Act and dealt with exclusively under HRIPA.¹⁰⁴

THE NEW LAW

3.43 The problem caused by overlapping regimes for access and amendment will be resolved or modified in two respects when the *Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009* (NSW) (the "GIPA Repeal Act") comes into operation:

97. For example, NSW Department of Corrective Services, *Submission to CP 3*, 6; NSW Department of Commerce, State Records, *Submission to CP 3*, 2; NSW Department of Education and Training, *Submission to CP 3*, 6.

98. Legal Aid, NSW, *Submission to CP 3*, 7.

99. See <[http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/misc004.pdf/\\$file/misc004.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/misc004.pdf/$file/misc004.pdf)>.

100. For example, State Library of NSW, *Submission*, 4.

101. Office of State Revenue, *Submission*, 2; Public Interest Advocacy Centre, *Submission*, 6.

102. P Youngman, *Submission*, 3, 4.

103. M Carter, *Submission*, 5.

104. South Eastern Sydney Illawarra Area Health Service, *Submission 1*.

- the access regime under the LGA will be abolished; and
- the amendment regime in the FOI Act will be transferred to PPIPA.

Abolishing access to information under the LGA

3.44 The GIPA Repeal Act provides that Chapter 4 Part 2 of the LGA, which deals with access to information, is omitted.¹⁰⁵ The abolition of the access regime under the LGA will remove one source of the overlapping requirements of that Act, PPIPA and the FOI Act in relation to Council documents.¹⁰⁶ This is to be welcomed.

Transferring the FOI Act amendment regime to PPIPA

3.45 The GIPA Repeal Act transfers Part 4 of the FOI Act, which deals with amendments, to PPIPA as a new Part 6A, to be inserted immediately after s 59.¹⁰⁷ For convenience, the new Part 6A is set out in Appendix 2 to this report. A transfer of like nature occurred in New Zealand in 1993 when the right to access personal information was moved from the *Official Information Act 1982* (NZ) to the *Privacy Act 1993* (NZ).¹⁰⁸

3.46 There are now thus two different regimes in PPIPA for dealing with amendment: the existing IPP 8 (s 15), which deals with the alteration of personal information; and Part 6A, which deals with the amendment of records. The new Part 6A is much more comprehensive in its requirements than IPP 8.

Should there be two amendment regimes in PPIPA?

3.47 The inclusion within one piece of legislation of two amendment regimes, which are not in all respects consistent,¹⁰⁹ clearly requires justification. The lack of consistency may suggest that justification can be found in the differing scope of the two regimes. However, any differences between the two regimes in this respect turn out, on analysis, to be apparent rather than real.

105. *Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009* (NSW) sch 2 cl 2.28 [2].

106. See para 3.28-3.31.

107. *Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009* (NSW) sch 1 [1].

108. *Official Information Amendment Act 1993* s 5.

109. See para 3.21.

3.48 Part 6A is limited in its application to information obtained by persons who have obtained access to a record held by an agency, whereas s 15 applies generally to personal information held by the agency. Since it is impossible to correct information held otherwise than in a record (such as, information held in the mind of an employee of the agency),¹¹⁰ this distinction cannot justify having two access regimes. The point has added significance if our recommendation that privacy legislation should apply to personal information that (a) is collected for inclusion in a record or a generally available publication, or (b) is held in a record, is adopted.¹¹¹

3.49 Part 6A is restricted to “information concerning the person’s personal affairs”, which, as already noted, is not the same as, but narrower than, “personal information”.¹¹² It is, however, difficult to believe that Parliament intended to restrict the correction of information to that relating to a person’s “personal affairs”, while adopting the expression “personal information” for the purposes of the rest of the GIPA Act, and, at the same time, inserting the correction regime into an Act that concerns the protection of “personal information”. It seems that the language of “personal affairs”, originally adopted in FOI legislation, and long abandoned in federal legislation,¹¹³ has simply carried over for no obvious reason into Part 6A.

3.50 Part 6A is restricted to information that is available for use by an agency in connection with its “administrative functions”, a phrase that is widely interpreted to refer to all functions relating to the agency’s management and to the execution of its responsibilities as derived from common law, statute or government arrangement.¹¹⁴ As this covers all documents that are held at least for operational purposes,¹¹⁵ it is difficult

110. See para 2.41; Recommendation 4.

111. See Recommendation 6.

112. See para 2.9.

113. See para 2.9, fn 17.

114. See *Commissioner of Police New South Wales v N* (2003) 58 NSWLR 458, 461 (Cripps AJ), approving the decision of the ADT in *N (No 3) v Commissioner of Police, New South Wales Police Service* [2002] NSWADT 34.

115. See *N (No 3) v Commissioner of Police, New South Wales Police Service* [2002] NSWADT 34, [37] (leaving open the possibility that “policy” and “commercial” documents are not “administrative” documents for the purposes of this section. See also *GA v Commissioner of Police, NSW Police* [2005] NSWADT 121, [8]-[13] (comparing the approach of FOI Act s 39(2) with PPIPA s 27.

to understand the need for a separate correction regime in respect of them: they would clearly be subject to amendment under PPIPA s 15.

3.51 Since the two regimes apply to essentially the same information, it is difficult to find a parliamentary intention that the special regime should apply to the exclusion of the general one,¹¹⁶ and this may leave open the unsatisfactory solution that the latter regime is intended to repeal the former¹¹⁷ – unsatisfactory, because this would leave a considerable hole in the coverage of the IPPs. The two amendment regimes in PPIPA simply do not mirror the situation under HRIPA where the legislation, however inadequately, provides for specific access and amendment regimes for private sector persons and states explicitly that the specific regimes are intended as additional to, or to assist the operation of, HPPs 7 (access) and 8 (amendment), which apply both to the public and private sectors.¹¹⁸

3.52 Clearly this unsatisfactory result needs to be rectified before Part 6A is brought into effect. The Commission can think of no reason for having more than one amendment regime in PPIPA. The general principles of that regime should, consistently with principled regulation,¹¹⁹ be stated in privacy principles, such as IPP 8 in s 15 of PPIPA.

Recommendation 10

PPIPA should contain only one amendment regime.

116. See D Pearce and R Geddes, *Statutory Interpretation in Australia* (6th ed, Butterworths, 2006) [4.32].

117. D Pearce and R Geddes, *Statutory Interpretation in Australia* (6th ed, Butterworths, 2006) [4.33].

118. HRIPA note to pt 4 div 3 (access) and to pt 4 div 4 (amendment).

119. See ALRC, R 108, vol 1 ch 4.

Achieving a single amendment regime in PPIPA

3.53 Any single amendment regime in PPIPA needs to take account of the UPPs formulated by the ALRC and recommended for adoption in NSW in our report, *Privacy Principles*.¹²⁰ In that report, we expressed our agreement in principle with UPP 9, a principle dealing with both access and correction.¹²¹ We reaffirm our agreement with that principle, which has received the substantial endorsement of the federal government.¹²² In our view, the adoption of UPP 9 would render unnecessary the need for the access regime envisaged by Part 6A of PPIPA. It is true that the access principles in UPP 9.6-9.8 are stated at a level of generality that excludes the detailed and prescriptive provisions that currently form part of Part 6A of PPIPA. Privacy legislation has traditionally adopted this method of regulation to allow individuals and agencies the maximum flexibility in dealing with questions (and disputes) about access and correction to personal information. In contrast, freedom of information legislation has traditionally adopted detailed and prescriptive rules relating to access and amendment of information, even though, in respect of amendment (though not access), it is only personal information (or currently information about personal affairs) that can be corrected under such legislation. We see no reason why PPIPA should not continue to regulate amendment of personal information in the traditional way, especially when it is borne in mind that the Privacy Commissioner can issue guidelines to fill any gaps that may exist in correction procedures.¹²³

3.54 For this reason, we see no need at all for Part 6A in privacy legislation. Our preferred position is that it should be repealed. While we have expressed our conclusion in the last paragraph by reference to UPP 9, we would assert the same result if s 15 were simply to be retained in its present form.

120. NSW Law Reform Commission, *Privacy Principles* Report 123 (2009).

121. NSW Law Reform Commission, *Privacy Principles* Report 123 (2009) [9.139].

122. See Australian Government, *Enhancing National Privacy Protection*, Australian Government First Stage Response to the Australian Law Reform Commission Report 108 *For Your Information: Australian Privacy Law and Practice* (October 2009) 64-72.

123. See NSW Law Reform Commission, *Privacy Principles*, Report 123 (2009) [9.136].

Recommendation 11

Part 6A of PPIPA should be repealed.

3.55 We recognise that it may be thought desirable to retain detailed and prescriptive rules relating to amendment of personal information even in privacy legislation, with the result that Recommendation 11 is not accepted. In that event, the detailed and prescriptive rules relating to amendment applications (including the procedures to be followed, the timetables for taking particular steps and what amounts to a refusal to amend records), should not be stated in the IPPs, but elsewhere in the legislation, presumptively Part 6A of PPIPA. Essentially, this would mean removing statements of general principle from Part 6A, leaving the Part to cover detailed and prescriptive rules. In the Commission's view, the provisions of Part 6A of PPIPA that deal substantially with matters of general principle (and so should be in the IPPs) are s 59B, 59H(1), (2)(b)(ii)-(v), (3), 46. The remaining provisions should remain in Part 6A.¹²⁴ It is obvious that what is retained in Part 6A of PPIPA must be consistent with the rest of the Act, including the current s 15, and this will require careful drafting.¹²⁵

Recommendation 12

If Recommendation 11 is not accepted, the detailed and prescriptive rules relating to access applications in Part 6A of the *Privacy and Personal Information Protection Act 1998* (NSW) should, so far as they are consistent with other provisions of *Privacy and Personal Information Protection Act 1998* (NSW), not form part of the IPPs, but be located elsewhere in the Act.

Consistency of current amendment regimes

3.56 Any attempt to rationalise the relationship between s 15 of PPIPA (IPP 8) and Part 6A of PPIPA needs to consider the extent to which the various legislative provisions are consistent. Moreover, consideration will need to be given to the consistency of both with UPP 9, whose adoption we have recommended. We first point out the extent to which s 15 of PPIPA is consistent with UPP 9; secondly, whether Part 6A of PPIPA is

124. See further ALRC, R 108, vol 2 [29.139]-[29.167].

125. See para 3.61-3.66.

consistent with s 15 of PPIPA and with UPP 9; finally, we point out the changes that must be made to the current provisions of Part 6A to the extent to which they are retained.

Consistency between PPIPA s 15 and UPP 9

3.57 Section 15 of PPIPA is generally consistent with UPP 9.6-9.8. There are however some discrepancies, namely:

- Section 15 is framed in terms of a request from an individual to an agency to amend personal information that relates to them and that the agency holds: the UPPs frame the principle in terms of the agency's responsibilities in respect of such information.
- Section 15(1) states that a public sector agency, on the request of an individual to whom information relates, "*must ... make appropriate amendments...to ensure*" the accuracy of personal information, while UPP 9.6 provides that an agency/organisation must take "*such steps, if any, as are reasonable*" to correct information.
- UPP 9.6 provides that whether personal information is accurate and up-to-date, relevant and not misleading must be considered "*with reference to a purpose for which it is held*". Section 15(1)(b) provides that whether information is relevant, up to date, complete and not misleading is to be determined by reference to the purpose for which the information was collected or is to be used, and to any purpose directly related to that purpose. In the ALRC's view, the requirement that the information is misleading, not accurate, complete, up-to-date or relevant "*with reference to a purpose for which it is held*" would mean that an agency will not be required to correct personal information that is not being used or disclosed.¹²⁶ We do not accept this narrow interpretation. Out of an abundance of caution, however, we would prefer the wording of s 15(1)(b) on the basis that it is not susceptible of a narrow interpretation that dilutes the correction principle.

3.58 There is one respect in which s 15 imposes requirements that are less onerous than in UPP 9. This relates to UPP 9.8, which provides that:

Where an agency or organisation denies a request for access or refuses to correct personal information it must provide the individual with:

126. ALRC, R 108, vol 1 [15.66].

- (a) reasons for the denial of access or refusal to correct the information, except to the extent that providing such reasons would undermine a lawful reason for denying access or refusing to correct the information; and
- (b) notice of potential avenues for complaint.

3.59 There is no such express obligation in s 15 of PPIPA (IPP 8). However, Part 6A of PPIPA does provide that notices of determination of an application for correction, if refusing the application, must specify the reasons for the refusal¹²⁷ and the rights to review.¹²⁸

3.60 The only other relevant difference is in s 15(2) and UPP 9.7, both of which deal with providing individuals with the right to have the information annotated where the accuracy of personal information is the subject of dispute. Section 15(2) requires an agency to “attach” a statement of the amendment sought, while UPP 9.7 requires an agency to “associate” such a statement with the relevant information. The ALRC notes that this wording in the UPP was specifically adopted as opposed to “attach” in order to be technologically neutral.¹²⁹ However, given that s 15(2) requires that the statement be attached “in such a manner as is capable of being read with the information”, the Commission is of the opinion that the current wording of s 15(2) captures the necessary level of technical neutrality and is therefore consistent with UPP 9.

Consistency between PPIPA Part 6A, PPIPA s 15 and UPP 9

3.61 The importation of the amendment provisions in Part 4 of the FOI Act into PPIPA (as Part 6A) with few transitional provisions gives rise to a number of inconsistencies. Of these, several are significant as they have the potential to limit the provisions dealing with amendment in s 15 of PPIPA. In our view, these inconsistencies must be addressed to the extent that the provisions of Part 6A are retained in any rationalisation of the principles and rules relating to the amendment or correction of personal information in privacy legislation prior to the effective commencement of the new regime of access to government information established by the GIPA Act.

127. PIPPA s 59H(2)(ii).

128. PIPPA s 59H(2)(iv).

129. ALRC, R 108, vol 2 [29.137].

3.62 First, under Part 6A, rights of correction apply only to persons “to whom access to an agency’s document has been given”.¹³⁰ This would unnecessarily exclude correction in circumstances where individuals have otherwise obtained evidence that an agency record contains incorrect personal information concerning them – for example, in a letter from the agency containing such information. No such requirement is contained in s 15 or in UPP 9, nor can the Commission see why it would be needed.¹³¹ It should be deleted.

3.63 Secondly, as discussed above, the new Part 6A will need to be amended to replace the expression “information concerning the person’s personal affairs” with the expression “personal information” to achieve consistency with s 15 and the UPPs.¹³²

3.64 Thirdly, Part 6A refers only the correction of “incomplete, incorrect, out-of-date or misleading” information, but not “irrelevant” information. Both s 15 and the UPP 9 provide that information should be corrected to make it “relevant”. Sections 59B(c), 59C(d), 59G4(a), 59I(1)(a) and 59I(3)(a)(i) of PPIPA should be amended to include the word “irrelevant”.

3.65 Fourthly, s 59I(3) of Part 6A provides that if an agency discloses to any person any information contained in the part of its records to which a notice of amendment or refusal of amendment is made, then the agency “shall ensure that there is given to that person, *when the information is disclosed*, a statement: (i) stating that the person to whom the information relates claims that the information is incomplete, incorrect, out of date or misleading, and (ii) setting out particulars of the notation added to its records under this section ...”. Curiously, there is no requirement to inform past recipients of information.¹³³ Sections 15(3) and UPP 9.6(b) both require, if it is practicable, the notification of other recipients to

130. PPIPA s 59B.

131. See ALRC, R 108, vol 1 [15.58]-[15.62].

132. See para 3.49.

133. Although PPIPA s 59I(4) states that “nothing in this section is intended to prevent or discourage agencies from giving particulars of a notation added to its records...to a person...to whom information contained in those records was given before the commencement of this section”, it does not resolve the issue because it is not a mandatory requirement and also because it does not deal with persons to whom information was given after the commencement of the section but before an amendment application is made.

whom personal information has already been disclosed. Part 6A should reflect these provisions.

3.66 Fifthly, Part 6A provides that review of correction and amendment decisions are to be made under Part 5 of the GIPA Act “as if the determination were a reviewable decision under that Part”. Part 5 of the GIPA Act provides for internal review by the relevant agency, review by the Information Commissioner and review by the Administrative Decisions Tribunal. However, as the provisions regarding correction of personal information are now in PPIPA there is no rational reason why review should take place under the GIPA Act rather than under Part 5 of PPIPA.

Recommendation 13

To the extent to which they are retained in any rationalisation of the principles and rules relating to the amendment or correction of personal information in privacy legislation, the provisions of Part 6A of PPIPA should be amended as follows:

(a) Section 59B should be amended to remove the words “to whom access to an agency’s document has been given”.

(b) Section 59B(a) should be amended to replace the words “information concerning the person’s personal affairs” with the expression “personal information”.

(c) Sections 59B(c), 59C(d), 54G(a), 59I(1)(a) and 59I(3)(a)(i) should be amended to include the word “irrelevant”.

(d) Section 59I(4) should be replaced by the following subsection:

(4) If an agency has already disclosed to any person (including any other agency and any Minister) any information contained in the part of its records to which a notice under this section relates, the agency, if requested to do so by the individual and provided it is practicable under the circumstances:

(a) shall ensure that there is given to that person, a statement:

(i) stating that the person to whom the information relates claims that the information is irrelevant, incomplete, incorrect, out of date or misleading, and

(ii) setting out particulars of the notation added to its records under this section; and

(b) may include in the statement the reason for the agency's refusal to amend its records in accordance with the notation.

(e) Section 59J should be amended to provide that review of amendment decisions under Part 6A are to be made under Part 5 of PPIPA.

Access regimes

3.67 There remains the potential for conflict in relation to overlapping regimes for access in PPIPA and the GIPA Act.¹³⁴ The GIPA Act provides for access applications in Part 4.

Access under the GIPA Act

3.68 Under the GIPA Act, a person seeking access to government information¹³⁵ has a legally enforceable right to be provided with access unless there is an overriding public interest against disclosure of the information.¹³⁶ That right is buttressed by a presumption in favour of disclosure of government information unless there is an overriding public interest against it.¹³⁷

3.69 Instead of making a formal access application, an applicant may make an informal request. Section 8 authorises an agency to release government information in response to such a request unless there is an overriding public interest against disclosure of the information.

3.70 Access applications are dealt with in Part 4 as follows. A person applying for access to personal (or other) information under the GIPA Act must make written application, accompanied by a \$30 fee.¹³⁸ Where an application by A for access to A's personal information involves the disclosure of personal information about B, the agency must take such steps (if any) as are reasonably practicable to consult with B before providing A with access to the information.¹³⁹ Some agencies have submitted that this creates the same uncertainty as existed under s 31 of

134. For a more detailed discussion, see NSW Law Reform Commission Report, *Privacy Principles*, Report 123 (2009) ch 9.

135. As defined in s 4(1) to mean "information contained in a record held by an agency".

136. GIPA Act s 9(1).

137. GIPA Act s 5.

138. GIPA Act s 41(1).

139. GIPA Act s 54(1) and 54(2).

the *FOI Act*, and that it would be helpful to receive some guidance as to the steps agencies were required to take.¹⁴⁰ If the agency decides to provide access despite B's objection, it must not provide access until it has notified B of that decision, and of B's rights to have that decision reviewed.¹⁴¹

3.71 An agency must decide the application within 20 working days, which period can be extended by up to 10 working days if consultation is required or records are to be retrieved from archives.¹⁴² Failure to decide the application within time is a deemed refusal.¹⁴³ Where an agency decides not to grant access, it must give written notice of its reasons and the nature of the records held.¹⁴⁴ Agencies are entitled to charge processing charges at an hourly rate¹⁴⁵ but for applications for personal information of the applicant they must not charge any fee for the first 20 hours of processing time.¹⁴⁶ The agency must usually provide access in the form sought by the applicant.¹⁴⁷

3.72 Where an agency refuses to provide access to an applicant's personal information, the applicant may seek internal review¹⁴⁸ within 20 working days of notice of that decision.¹⁴⁹ An agency must make its decision on internal review within 15 working days of receiving the application.¹⁵⁰ A disappointed applicant may also seek review by the newly appointed Information Commissioner,¹⁵¹ who may make such recommendations to the agency as he or she thinks appropriate,¹⁵² or may refer a decision to the ADT.

140. NSW Department of Community Services, *Submission*, 2.

141. GIPA Act s 54(6).

142. GIPA Act s 57.

143. GIPA Act s 53(1).

144. GIPA Act s 61.

145. GIPA Act s 64(1).

146. GIPA Act s 67.

147. GIPA Act s 72(2).

148. GIPA Act s 80, s 82(1).

149. GIPA Act s 83(1).

150. GIPA Act s 86(1).

151. GIPA Act s 89(1).

152. GIPA Act s 92.

3.73 Finally, a disappointed applicant might seek external review by the ADT, without first seeking internal review or review by the Information Commissioner.¹⁵³ Such application must be made within eight weeks after notice of the decision.¹⁵⁴ The Information Commissioner has a right to appear and be heard in proceedings before the ADT.¹⁵⁵

3.74 As under the FOI Act, in any review the agency bears the burden of establishing that the decision is justified.¹⁵⁶ If the review is of a decision to grant access, the burden of establishing that the decision is justified lies on the agency.¹⁵⁷

Comparing access under the GIPA Act to access under PPIPA

3.75 The GIPA Act and PPIPA differ in relation to access to personal information in the following ways:

- the GIPA Act requires applications to be in writing:¹⁵⁸ PPIPA does not;
- the GIPA Act requires payment of a fee:¹⁵⁹ PPIPA does not;
- the GIPA Act provides for consultation with certain people prior to release:¹⁶⁰ PPIPA does not;
- under the GIPA Act, an agency must decide an application and give notice to the applicant within 20 working days:¹⁶¹ there is no such requirement in PPIPA;
- under the GIPA Act, an agency must give written notice of a decision to refuse access, stating reasons and findings of fact:¹⁶² the requirement under s 58(3) of PPIPA is less onerous;
- under the GIPA Act, the applicant may choose the form of access:¹⁶³ under PPIPA he or she may not;

153. GIPA Act s 100.

154. GIPA Act s 101(1).

155. GIPA Act s 104(1).

156. GIPA Act s 105(1).

157. GIPA Act s 105(2).

158. GIPA Act s 41(1)(a).

159. GIPA Act s 41(1)(c).

160. GIPA Act s 54.

161. GIPA Act s 57(1).

162. GIPA Act s 61.

163. GIPA Act s 72.

- under the GIPA Act, an applicant has only 20 days to apply for internal review;¹⁶⁴ under PPIPA an applicant has 6 months;¹⁶⁵
- under the GIPA Act, an agency must make its decision on an internal review within 15 days;¹⁶⁶ there is no time limit in PPIPA; and
- under the GIPA Act, there is provision for merits review by the Information Commissioner¹⁶⁷ as well as the ADT.¹⁶⁸

3.76 The comprehensive procedure in the GIPA Act for dealing with access to documents differs from the simple requirement on an agency to provide access to the personal information it holds of an applicant. The problem of conflicting regimes that has been noticed under the current law still continues to exist.¹⁶⁹ Further, an applicant for access to personal information under the GIPA Act will now have to apply under PPIPA for amendment. This is likely to contribute to further confusion and uncertainty in practice.

The GIPA Act and the SRA

3.77 There is also an overlap between the GIPA Act and the SRA. Section 123 of the GIPA Act provides that it does not affect the operation of the SRA. In a submission to the Commission, the State Records Authority of NSW made a number of points about the inter-relationship between the two Acts. First, under the GIPA Act, a person may seek access to a document not otherwise open to access under the SRA.¹⁷⁰ Secondly, once personal information in a State record becomes open to public access under the SRA (once it is 30 years old) there is no need for application under any of the other Acts.¹⁷¹ Thirdly, it would be beneficial to eliminate the overlapping provisions on amendment of personal information in the various Acts.

164. GIPA Act s 83.

165. PPIPA s 53.

166. GIPA Act s 86.

167. GIPA Act pt 5 div 3.

168. GIPA Act pt 5 div 4.

169. See para 3.19-3.36.

170. State Records Authority of NSW *Submission*, 2.

171. State Records Authority of NSW *Submission*, 3.

The Commission's view

3.78 We are of the view, supported by a number of submissions received in response to CP 3¹⁷² and to our 2009 paper, *Privacy and Access to Personal Information: Points For Discussion*,¹⁷³ that the most satisfactory way to resolve the difficulties created by the differences between the regimes, in particular between the GIPA Act and PPIPA, in relation to access to personal information is to provide that all applications by an individual for access to and amendment solely of his or her personal information should be under the one Act, namely, PPIPA. It is true that PPIPA is much less prescriptive in terms of procedure, but that is appropriate for applications solely for personal information of the applicant. Mixed applications – namely, applications for the personal information of the applicant and of third parties and/or of other government information – should be dealt with under the GIPA Act.

3.79 The ALRC supported this view in one of its recent Discussion Papers on privacy law,¹⁷⁴ citing international authority that the right to access and amend one's own personal information are "fundamental privacy rights" which should be dealt with under privacy legislation.¹⁷⁵ In respect of access, the Australian government has supported this view.¹⁷⁶

3.80 The FOI Independent Review Panel in Queensland, in its final report, agreed with the ALRC's recommendation, recommending that access and amendment rights for personal information should be moved from freedom of information to a privacy regime, preferably to a separate Privacy Act.¹⁷⁷ The Panel observed that protecting privacy rights under a privacy regime rather than through FOI processes should make the process simpler and quicker, for agencies and applicants and noted that this would also mean that the FOI Act " ... would deal primarily with the

172. See para 3.37.3.42.

173. See <[http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/misc004.pdf/\\$file/misc004.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/misc004.pdf/$file/misc004.pdf)>; see also Public Interest Advocacy Centre, *Submission*, 6.

174. ALRC, *Review of Australian Privacy Law*, Discussion Paper 72 (2007) [12.42], Proposals 12-6 and 12-7.

175. ALRC, *Review of Australian Privacy Law*, Discussion Paper 72 (2007) [12.39].

176. Australian Government, *Enhancing National Privacy Protection*, Australian Government First Stage Response to the Australian Law Reform Commission Report 108 *For Your Information: Australian Privacy Law and Practice* (October 2009) 64-65.

177. FOI Independent Review Panel, *The Right to Information, Reviewing Queensland's Freedom of Information Act* (2008) 45 and Recommendation 11.

matters for which it was designed, relating to governance and accountability.”¹⁷⁸

3.81 The Queensland Government, in its response to the Panel’s Report, supported this proposal, stating that it would develop a separate Privacy Bill that would deal with access and amendment rights for personal information.¹⁷⁹ It has since passed the *Information Privacy Act 2009 (Qld)*, ch 3 of which provides for access and amendment of personal information.

Recommendation 14

Part 4 of the GIPA Act should provide expressly that it does not apply to access applications that relate solely to the personal information of the applicant.

CLARIFYING THE RELATIONSHIP BETWEEN PPIPA AND THE GIPA ACT

3.82 If Recommendation 14 is not implemented, an application for access to purely personal information in an agency document will be burdened by the requirements relating to access applications in Part 4 of the GIPA Act. This is because of the relationship between PPIPA and the GIPA Act as prescribed by PPIPA s 5, 20(5) and 25.

3.83 First, s 5 of PPIPA provides that nothing in that legislation affects the operation of the GIPA Act, and, in particular that PPIPA does not operate to lessen any obligations under the GIPA Act in respect of a public sector agency. Secondly, s 20(5) of PPIPA provides that:

Without limiting the generality of section 5, the provisions of the GIPA Act that impose conditions or limitations (however expressed) with respect to any matter referred to in section 13, 14 or 15 are not affected by this Act, and those provisions continue to apply in relation to any such matter as if those provisions were part of this Act.

178. FOI Independent Review Panel, *The Right to Information, Reviewing Queensland’s Freedom of Information Act*, (2008) 45.

179. Queensland Government, *The Right to Information, A response to the Review of Queensland’s Freedom of Information Act* (2008) 14.

Sections 13 to 15 of PPIPA contain, respectively, the IPPs relating to the steps that must be taken by agencies to determine if they hold personal information about the applicant (IPP 6), to access (IPP 7) and to amendment or correction (IPP 8). Thirdly, s 25 of PPIPA provides that an agency is not required to comply with certain IPPs (including those relating to access and amendment) if the agency is lawfully authorised or required by law not to comply, or if non-compliance is otherwise permitted (or necessarily implied or reasonably contemplated) under statute or other law.¹⁸⁰

3.84 Under these provisions an application under PPIPA for access to purely personal information contained in an agency document will, by reason of s 20(5), have to comply with the “conditions” relating to access in Part 4 of the GIPA Act. Recommendation 14 alters this result.

3.85 Recommendation 14 does not, however, allow an applicant to obtain access under PPIPA to documents that would not be released under the GIPA Act. This is, arguably, the result of the application of PPIPA s 5 (access would affect the operation of the GIPA Act, that is, by undermining it); of s 20(5) (the inaccessibility of the documents under the GIPA Act is a limitation on s 14) and/or of s 25 (the agency is not required to comply with access under the GIPA Act).¹⁸¹ We agree with this result. So does the Australian Government, which has written: “The Privacy Act should not allow individuals to obtain access to information that would not otherwise be accessed under the FOI Act or other applicable ... laws”.¹⁸² However, we accept that the labyrinth of obscurely worded provisions in PPIPA is not the best way of achieving this result. In our view, privacy legislation should spell out, as UPP 9.1(a) does, that an

180. The position under HRIPA also needs to take account of a qualification to HPPs 6-8 (corresponding to IPPs 6-8), namely that an organisation is not obliged to comply with the principles to the extent to which it is lawfully authorised not to do so or non-compliance is otherwise permitted under a statute or other law.

181. Because, for example, there is an overriding public interest against disclosure of the information: GIPA Act s 9(1).

182. Australian Government, *Enhancing National Privacy Protection*, Australian Government First Stage Response to the Australian Law Reform Commission Report 108 *For Your Information: Australian Privacy Law and Practice* (October 2009) 64.

agency is not required to provide access to a document where it is required or authorised by law to refuse such access.¹⁸³

3.86 Section 20(5) of PPIPA also acts to import into PPIPA limitations from the GIPA Act that relate to the amendment of personal information (PPIPA s 15); and to the steps that must be taken by agencies to determine if they hold personal information about the applicant (PPIPA s 13). Once the GIPA Repeal Act comes into force, all provisions relating to the amendment of personal information will be in PPIPA, making s 20(5) unnecessary to the extent that it refers to s 15. Moreover, s 20(5) should not need to refer to the steps that must be taken by agencies under s 13. Recommendation 14 means that, so far as those steps are contained in Part 4 of the GIPA Act,¹⁸⁴ they do not apply to applications for access to purely personal information. Moreover, so far as they are contained elsewhere in the GIPA Act,¹⁸⁵ a reference to them is unnecessary as the obligation on agencies in PPIPA s 13 is comprehensively stated. That obligation ought to be retained in privacy legislation in NSW, though not necessarily in its privacy principles, to which it is logically anterior.

3.87 This leaves open the question whether agencies should be under an obligation to take steps to determine if it holds personal information about the applicant (PPIPA s 13), or be required to correct personal information about an applicant (PPIPA s 15), where that information is or would be held in a document that would not be subject to disclosure under the GIPA Act. Section 25 of PPIPA may mean that an agency is not required to comply with the obligations under s 13 and s 15, non-compliance being necessarily implied or, more likely, reasonably contemplated under the GIPA Act. We are not, however, persuaded that the fact that government information is subject to non-disclosure under the GIPA Act should necessarily mean that agencies should be exempt from the obligations in s 13 and s 15,¹⁸⁶ at least if, as UPP 9.8 provides, an agency is relieved of any obligation to explain the reasons for refusing to correct the information where it would undermine a lawful reason for denying an application for access or correction.

183. See HPP 7(2); HRIPA sch 1 cl 7.

184. See GIPA Act s 53.

185. Consider the obligations of agencies in GIPA Act s 16.

186. HRIPA sch 1 cl 6(2), 8(4) is based on the contrary assumption.

RECOMMENDATION 15:

Section 20(5) of PPIPA should be amended in the following respects:

- (a) to exclude reference to PPIPA s 13 and s 15; and
- (b) to make it clear that an individual cannot obtain access to a document that is not subject to disclosure under the GIPA Act.

4. **Personal information of third parties**

- Introduction
- The FOI act
- PPIPA
- Protecting the personal information of third parties under FOI
- The GIPA Act

INTRODUCTION

4.1 The previous chapter dealt with the problems that arise when an individual seeks access to his or her own personal information under the different statutory regimes for freedom of information and privacy. This chapter will consider the second main area of overlap between freedom of information and privacy legislation – what happens when information is protected from disclosure under the *Privacy and Personal Information Protection Act 1998* (NSW) (“PPIPA”), but required to be disclosed under the *Freedom of Information Act 1989* (NSW) (“FOI Act”), or its successor, the *Government Information (Public Access) Act 2009* (NSW) (“GIPA Act”)? There is potential for a different result to be achieved depending upon the Act under which the application is made.

4.2 The situation may arise as follows. First, where an individual seeks access to his or her own information, but that information is inextricably linked to the information of a third party, so that disclosure of one necessarily entails disclosure of the other.¹ Secondly, where an individual makes an application under the FOI Act for a document which contains personal information about a third party, although not about the applicant. In both instances, there is the potential for the third party’s privacy to be compromised.

4.3 How, then, is the balance struck? This chapter will consider first how the FOI Act deals with the conflict between freedom of information and privacy; secondly, how PPIPA does so; and, finally, how the successor to the FOI Act, the GIPA Act, conducts the balancing exercise.

THE FOI ACT

4.4 Where a person seeks access to either personal or non-personal information under the FOI Act there is a risk that access will involve the disclosure of personal information of a third party. What privacy protection does the FOI Act provide to safeguard against that possibility?

1. Thus, where the personal information of one person is “intertwined with the personal information of another, the decision-maker must balance the interests of both people in deciding whether disclosure would be unreasonable in the circumstances”: *Re Albanese and the Chief Executive Officer of the Australian Customs Service* (2006) 44 AAR 112, [26].

4.5 Section 16 of the FOI Act provides that a person has a legally enforceable right to be given access to an agency's documents. There is no equivalent right to privacy contained in PPIPA, which suggests that in balancing the competing considerations, the scales might already be tipped in favour of freedom of information over privacy.

4.6 Section 25(1)(a) provides that an agency "may" in its discretion refuse access to a document if it is an exempt document. No guidelines are given as to how that discretion should be exercised. The categories of exempt documents are listed in sch 1 to the Act. An agency may give access to a document with the exempt matter deleted.²

4.7 Schedule 1 cl 6, entitled "Documents affecting personal affairs", contains the privacy exemption. It provides as follows:

- (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (whether living or deceased).
- (2) A document is not an exempt document by virtue of this clause merely because it contains information concerning the person by or on whose behalf an application for access to the document is being made.

4.8 There are similar provisions in the freedom of information legislation of the Commonwealth and most of the other States and Territories.³

4.9 It follows that a document containing information concerning a person's personal affairs may be released under the FOI Act if the agency decides:

- (i) that the document is not exempt because it does not concern the personal affairs of any person;
- (ii) that the document is not exempt because, in the circumstances, disclosure would not be unreasonable; or

2. FOI Act s 25(4).

3. *Freedom of Information Act 1982* (Cth) s 41; *Freedom of Information Act 1989* (ACT) s 41; *Information Act 2002* (NT) s 56; *Freedom of Information Act 1991* (SA) sch 1 pt 2 cl 6; *Freedom of Information Act 1991* (Tas) s 30; *Freedom of information Act 1982* (Vic) s 33; *Freedom of Information Act 1992* (WA) sch 1 cl 3 .

- (iii) to exercise its discretion to release the document even although it is exempt. There are no statutory guidelines for the exercise of this discretion. It is unlikely that the ADT has an overriding discretion, on review, to order that access be given to exempt documents if that is the correct and preferable decision.⁴

4.10 This presents the following potential problems in terms of privacy protection. First, an agency has an untrammelled discretion to disclose a document even if it involves an unreasonable disclosure of information concerning a person's personal affairs and is thus exempt under sch 1 cl 6. Secondly, in deciding whether the document is exempt the only criterion the Act provides is that disclosure would be "unreasonable". Thirdly, there is no reference to the relevant Information Protection Principles ("IPPs") contained in PPIPA, which prohibit the disclosure of personal information by a public sector agency to a third party except in limited circumstances.⁵ There is thus a risk that an agency might disclose a document under the FOI Act in circumstances inconsistent with PPIPA and with privacy protection.

PPIPA

4.11 Where an individual seeks access under PPIPA to his or her own personal information, but that information is mixed with someone else's personal information, a problem arises as to privacy protection. At that point, sections 18 and 19, which deal with the limits on disclosure of personal information, come into play. An agency must not disclose personal information to a third party unless:⁶

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4. See *McGuirk v University of NSW* [2009] NSWCA 321, [34]-[39] (where, contrary to the decision of Nicholas J in *University of NSW v McGuirk* [2006] NSWSC 1362, [102], Basten JA suggests (obiter) that the relevant statutory provisions do not empower the ADT, on review, to order the release of an otherwise exempt document). For a discussion of the policy reasons supporting this conclusion, see *Neary v The Treasurer, NSW* [2002] NSWADT 261. For the position in respect of restricted documents under sch 1 pt 1 of the FOI Act, see *IPART v Services Sydney* [2008] NSWADTAP 79, [46]; *Martin v Commissioner of Police, NSW Police Force* [2009] NSWADTAP 67, [39].
5. PPIPA s 18, 19.
6. PPIPA s 18.

- (a) the disclosure is directly related to the purpose for which the information was collected and the agency has no reason to believe that the individual concerned would object to the disclosure;
- (b) the individual concerned is reasonably likely to be aware, or has been made aware that information of that kind is usually disclosed to that other person; or
- (c) the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of that individual or another person.

4.12 There are special restrictions on the disclosure of sensitive personal information concerning a person’s ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership or sexual activities. Personal information relating to these matters must not be disclosed unless disclosure is necessary to prevent a serious or imminent threat to the life or health of the individual concerned or another person.⁷

4.13 The level of privacy protection is thus much greater under PPIPA than under the FOI Act. Under PPIPA, “personal information” is protected from disclosure unless any of the three exceptions applies. Under the FOI Act, privacy protection is more limited for two reasons. First, the definition of the material protected, namely “information concerning the personal affairs of any person”, is a narrower expression than “personal information”,⁸ which is not confined to information concerning a person’s personal affairs.⁹ Secondly, even if the material falls within the concept of information concerning a person’s personal affairs, it will only be exempt from disclosure if such disclosure would be unreasonable. This involves a balancing exercise that is discussed below.

7. PPIPA s 19.

8. For a discussion of both concepts, see P Bayne and K Rubenstein, “The Concepts of ‘Information Relating to Personal Affairs’ and ‘Personal Information’” (1994) 1 *Australian Journal of Administrative Law* 226.

9. *WL v Randwick City Council* [2007] NSWADTAP 58, [20]; para 3.49.

PROTECTING THE PERSONAL INFORMATION OF THIRD PARTIES UNDER FOI

4.14 The purpose of sch 1 cl 6 of the FOI Act is "... to protect information of third parties who may be referred to in agency documents but who may be unaware that their private affairs stand subject to exposure by a claim for access made under the Act".¹⁰ Thus the clause "allow[s] the public interest in personal privacy to be balanced against the public interest in people having open access to information held by government".¹¹

4.15 This is a key provision in considering, as our terms of reference require us to do, the adequacy of freedom of information legislation in protecting individual privacy in the context of access applications. In this section, we therefore consider how the provision has been interpreted and applied in practice; in particular, whether it has been interpreted in a way that is consistent with PPIPA, especially with the IPPs. Overall, it is apparent from decisions of the ADT that the need for privacy protection has been taken into account when a decision-maker decides whether to release information concerning a third party's personal affairs. What is missing from the discussion in the cases is, however, any discussion of the IPPs, in particular s 18, which prohibits the disclosure of personal information of a third party unless one of the three exceptions applies.

Personal affairs

4.16 The expression "personal affairs" used in the FOI Act is narrower than the expression "personal information" used in PPIPA.¹² The ADT has held that the latter has no bearing on the meaning of the former.¹³

4.17 The expression "personal affairs" has, nonetheless, been given a relatively broad construction. In *Young v Wicks*,¹⁴ Justice Beaumont held

10. *Commissioner of Police v District Court of NSW* (1991) 31 NSWLR 606, 620 (Kirby P).

11. *Gilling v General Manager, Hawkesbury City Council* [1999] NSWADT 43, [31] (Hennessy DP).

12. *Re Russell Island Development Assn Inc and Department of Primary Industries & Energy* (1994) 33 ALD 683. See also P Timmins, "Decisions on the 'Personal Affairs' exemption in the NSW FOI" (2003) 10 *Privacy Law & Policy Reporter* 43

13. *Department of Education and Training v Mullet* [2002] NSWADTAP 13, [54].

14. *Young v Wicks* (1986) 13 FCR 85, 89.

in relation to the analogous Commonwealth provision that it referred to “matters of private concern to an individual”. In *Colakovski v Australian Telecommunications Corporation*, Justice Lockhart preferred the view that “personal affairs” meant “... information which concerns or affects the person as an individual whether it is known to other persons or not”.¹⁵ After a thorough review of the cases, Justice Kirby, in the leading NSW decision of *Commissioner of Police v District Court of New South Wales*, held that the expression meant “the composite collection of activities personal to the individual concerned”.¹⁶ In *Simring v Commissioner of Police, NSW Police*, Acting Justice Smart held that “it is not possible to give a comprehensive definition of personal affairs ... ‘Personal affairs’ is a broad description and a broad concept”.¹⁷ Whether a document contains information about the personal affairs of a person is a question of fact to be determined from the circumstances of each individual case.¹⁸ Clearly the broader the construction given to the expression, the greater potential for privacy protection.

4.18 The decisions referred to in the previous paragraph have been applied by the ADT in a number of cases concerning sch 1 cl 6.¹⁹ The ADT has held that a broad range of matters concern the personal affairs of a person, ranging from a person’s name and address in some instances;²⁰ statements to the police;²¹ reports that provide a basis for disciplinary proceedings;²² statements provided to an investigator;²³ a petition

15. *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429, 436.

16. *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606, 625.

17. *Simring v Commissioner of Police, NSW Police* [2009] NSWSC 270, [52].

18. *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606, 643 (Clarke JA); *Chief Executive Officer, State Rail Authority v Woods* [2000] NSWADTAP 25, [31].

19. See, for example, *Chirita v Commissioner of Police* [2009] NSWADT 69; *JY v Commissioner of Police* [2008] NSWADT 306; *Humane Society International Inc v National Parks and Wildlife Service* [2000] NSWADT 133.

20. *Gilling v Hawkesbury City Council* [1999] NSWADT 43. These will not always fall within the exemption: *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606, 638 (Mahoney JA).

21. *Simring v Commissioner* [2009] NSWSC 270; *JY v Commissioner of Police* [2008] NSWADT 306.

22. *CY v Northern Sydney Central Coast Area Health Service* [2008] NSWADT 315.

23. *Howell v Macquarie University* [2007] NSWADT 95.

complaining about a co-worker;²⁴ and, a doctor's application for a licence to operate particular machinery.²⁵

Unreasonable disclosure

4.19 In *Colakovski v Australian Telecommunications Corporation* Justice Lockhart stated, in the context of the equivalent Commonwealth provision, that:

What is unreasonable disclosure of information ... must have, as its core, public interest considerations. The exemptions ... are themselves ... public interest considerations ... The exemption from disclosure of such information is not to protect private rights; rather it is in furtherance of the public interest that information of this kind is excepted from the general right of public access ...²⁶

This passage highlights the tension between the FOI Act and privacy protection. The FOI Act itself provides no guidance as to when disclosure would be unreasonable, giving the decision-maker a broad discretion. The clause has been interpreted to mean that the determination of whether disclosure would be unreasonable requires a balancing of competing public interests, that is, the public interest of members of the public being given access to government documents and the public interest in preserving the privacy of third parties.²⁷

4.20 The cases have identified a number of factors relevant to a determination as to when disclosure of information concerning a person's personal affairs is unreasonable. They include:²⁸

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24. *State Rail Authority v Wood* [2003] NSWADTAP 25.
 25. *Fulham v Director-General, Department of the Environment and Conservation* [2005] NSWADT 68.
 26. *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429, 438.
 27. *Martin v Commissioner of Police, NSW Police* [2005] NSWADT 23, [39]. See also *Re Scholes and Australian Federal Police* (1996) 44 ALD 299 (considering the analogous Commonwealth provision).
 28. See *Victoria Police v Marke* [2008] VSCA 218, [19] ("Marke"); *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALN N257; *Page v Metropolitan Transit Authority* [1988] 2 VAR 243; *Saleam v Director-General, Department of Community Services and ors* [2002] NSWADT 41; *Martin v Commissioner of Police* [2005] NSWADT 23.

- the identity and nature of the parties;
- the nature of the information, the disclosure of sensitive information being more likely to be regarded as unreasonable;²⁹
- the applicant's interest in the information;
- the circumstances in which it was obtained;
- the likelihood that the person concerned would not want the information disclosed without consent;
- whether the information has any current relevance;
- the damage likely to be suffered by the relevant person by its release, including possible harassment by the access applicant;³⁰
- the nature and interest of the public;
- (perhaps) the applicant's motives;³¹ and
- the fact that the person to whom the information relates objects – a relevant but not conclusive factor.³²

4.21 The ADT has applied these principles in a way that indicates that it is cognisant of concerns about privacy protection. For example, in *Freedman v Macquarie University*,³³ the ADT considered whether the penultimate draft of a report evaluating the performance of one of the University's Divisions should be disclosed. The document contained summaries of confidential statements made by people to assist in investigation of problems in the administration of the Division. The academic whose administration was the subject of the investigation opposed disclosure, and the statements were given on the understanding that they would remain confidential. After noting that "the main purpose of the clause 6 exemption is to protect the privacy of individuals",³⁴ the ADT held that it would be unreasonable to disclose the information given the circumstances in which it was provided.

29. *Re Z and Australian Taxation Office* (1984) 6 ALD 673, 677.

30. *Gilling v General Manager, Hawkesbury City Council* [1999] NSWADT 43.

31. *Marke*, [104]; *Gilling v General Manager, Hawkesbury City Council* [1999] NSWADT 43; *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606, 627, 639, 645.

32. *Saleam v Director-General, Department of Community Services* [2002] NSWADT 41, [46].

33. *Freedman v Macquarie University* [2008] NSWADT 105.

34. *Freedman v Macquarie University* [2008] NSWADT 105, [53].

4.22 The Victorian Court of Appeal has recently considered the meaning of the Victorian equivalent of sch 1 cl 6, which is in very similar terms, in *Victoria Police v Marke*,³⁵ a case that is likely to be followed in NSW.³⁶ The Victorian Court of Appeal there gave careful consideration to the factors to be taken into account in determining whether a particular disclosure was unreasonable, in particular, whether the likelihood of dissemination by the applicant was relevant. The majority held that it was.

4.23 The respondent, a senior policeman, had been the subject of an ethical inquiry, which found that complaints against him that had been broadcast on television by the complainant were not substantiated. He sought a finding of exoneration, and that the complainant be charged with making a false report to the police, and in the pursuit of those aims sought access to communications between the police and the complainant. Access was refused and the Victorian Civil and Administrative Tribunal (“VCAT”) upheld that decision on the basis that disclosure to the respondent would necessarily be disclosure to the “world at large” of the complainant’s identity. The judge at first instance held that VCAT had failed to consider a relevant factor, namely the respondent’s assurance that he would not disseminate the information, and remitted the matter to VCAT.

4.24 That decision was upheld on appeal. Justice Weinberg referred to the respondent’s evidence that he would not disseminate the material in question and held that the extent of possible dissemination was capable of being an important factor in determining the reasonableness of disclosure.³⁷ He noted that privacy could be invaded to a greater or lesser degree, and that a minor intrusion into a person’s affairs would not have the same force, when considering reasonableness of disclosure, as a substantial infringement of a person’s privacy.³⁸ He noted that as the complainant had already aired her complaints on television she had only “a limited place to hide behind the shield of privacy law protection”³⁹ when seeking to conceal personal information – her identity – that she had already revealed to the world.

35. *Marke*.

36. See *Simring v Commissioner of Police, NSW Police* [2009] NSWSC 270, [71]; *Department of Education and Training v GJ* [2009] NSWADTAP 33, [47].

37. *Marke* [88].

38. *Marke* [79] and [87].

39. *Marke* [84].

4.25 Justice Pagone held that the section should not be narrowly construed, given the “very significant public interest” which it sought to protect, namely the right of any person to have his or her personal affairs kept private.⁴⁰ He also endorsed the concept that the section required a decision-maker to balance the public interest in disclosure with the personal interest of privacy. He pointed to the use of the word “would” as opposed to “might” or “could” as indicating that the decision-maker must have a high degree of confidence in the conclusion that disclosure would be unreasonable.⁴¹ He held that a decision-maker could have regard to the extent of disclosure, but disagreed that the decision-maker “must” do so.⁴²

4.26 Justice Maxwell took a different approach. He held that, in addition to the factors referred to earlier,⁴³ other relevant factors in determining whether disclosure would be unreasonable included the relationship between the personal information and any other information in the document and whether and to what extent the personal information was already known to the applicant.⁴⁴ Justice Maxwell also held that, contrary to earlier authority, the statute did not require a “balancing” of the right to privacy and the statutory right to information. He held that the relevant section required instead “...the making of a judgment, based on a synthesis of the relevant features of the case at hand, about whether the disclosure of the personal information to the applicant would be unreasonable”.⁴⁵

4.27 Justice Maxwell also rejected the assumption, previously applied, that disclosure was to the “world at large”, and not merely to the applicant.⁴⁶ He held that the likelihood that the applicant would disseminate the material was not a relevant consideration. He did however suggest that given the enactment of the *Information Privacy Act 2000* (Vic) and the importance of information privacy, perhaps the applicability of the “personal affairs” exemption should be made to

40. *Marke* [96].

41. *Marke* [97].

42. *Marke* [105].

43. See para 4.20.

44. *Marke* [19].

45. *Marke* [23].

46. *Marke* [28].

depend on the likely dissemination of a document once disclosed under the Act.⁴⁷

4.28 The cases thus indicate that in determining whether disclosure would be unreasonable, courts and tribunals have to consider the competing public interests of disclosure and privacy protection. Significantly, what emerges from a review of the ADT decisions is that in determining whether disclosure would be unreasonable in a particular case, even although the cases refer to privacy considerations, none of them identifies as a relevant factor that disclosure would be a breach of the IPPs in PPIPA s 18 and s 19. Thus none of them considers whether:

- (a) the disclosure is directly related to the purpose for which the information was collected and the agency has no reason to believe the person would object;
- (b) the individual was aware, or was made aware, that information of that kind was usually disclosed to persons such as the applicant;
- (c) the agency believed that disclosure was necessary to prevent or lessen a serious and imminent threat to the life or health of the person concerned; or
- (d) in the case of sensitive information, the disclosure was necessary to prevent a serious and imminent threat to the life or health of the individual concerned or another person.

4.29 One way to ascertain whether the way in which sch 1 cl 6 has been interpreted provides adequate privacy protection is to consider whether cases where access has been granted to a document would be in breach of PPIPA. If so, that would indicate that the way in which the FOI Act was being construed was not providing a level of privacy protection consistent with the IPPs.

4.30 In *Humane Society International Inc v National Parks and Wildlife Service* the applicant sought access to the details (names and addresses) of holders of licences issued to cull flying foxes to protect their commercial

47. *Marke* [36].

orchards.⁴⁸ The respondent granted access in part, deleting names and addresses and the locality details of the licences. The applicant before the ADT sought access only to the licence localities. The ADT accepted that in most cases that address corresponded with the home address of the licence applicant and thus did constitute personal affairs. Many of the licence-holders objected to the release and questioned the applicant's motives. The ADT accepted evidence that the applicant's motive was scientific research, not to mount an environmental protest campaign or to approach licence holders, and held that it was not unreasonable for the applicant to receive the information for the stated research purpose.⁴⁹

4.31 It is arguable that the provision of that information was not consistent with s 18 of PPIPA. The disclosure was not related to the purpose for which the information was collected (s 18(1)(a)). The licence holders were unlikely to have been or made aware that details of their licences would be disclosed to a person such as the applicant (s 18(1)(b)), and there was no suggestion of a threat to anyone's life or health (s 18(1)(c)).

4.32 In *Robinson v Director-General, Department of Health*, the access applicant, a psychologist employed in the public sector in a country town, sought access to all documents collected as part of an investigation into alleged corrupt conduct by him, in operating a private practice from his rooms.⁵⁰ The ADT held that two categories of document fell outside the concept of "personal affairs" and could therefore be disclosed. First, applications by psychologists employed in the public sector for a limited right of private practice fell outside the definition of "personal affairs".⁵¹ Secondly, documents containing the views of third parties about the access applicant's work performance did not concern the personal affairs of those third parties.⁵²

4.33 If the IPP in s 18 of PPIPA was applied to those facts, it is arguable that both categories of document would have been protected from disclosure. In neither case could it be said that the disclosure related to

48. *Humane Society International Inc v National Parks and Wildlife Service & ors* [2000] NSWADT 133 ("*Humane Society*").

49. *Humane Society*, [55].

50. *Robinson v Director-General, Department of Health* [2002] NSWADT 222 ("*Robinson*").

51. *Robinson* [94]-[95].

52. *Robinson* [103].

the purpose for which the information was collected (s 18(1)(a)). Nor was it likely that the third parties were aware or were made aware that information of that nature was usually disclosed to fellow psychologists such as the access applicant (s 18 (1)(b)). Finally, disclosure was not necessary to prevent or lessen a serious and imminent threat to anyone's life or health (s 18 (1)(c)).

4.34 In *JY v Commissioner of Police*, the mother of a young disabled child who had died while on an access visit to her father, the applicant's ex-husband, sought access to all police statements relating to her daughter.⁵³ The respondent declined to release three statements given in confidence on the day the child died. The makers of the statements opposed release on the basis of the emotional effect the death had had on them, and their desire to ensure their privacy.

4.35 The ADT found that each of those statements contained personal information relating to the makers of the statement, and the critical issue was whether disclosure would be unreasonable. It held that there were a number of public interest factors in favour of disclosure, including the administration of justice; the protection of the disabled and of young children; the maintenance of parental responsibility for infant children; and the disclosure of information relating to the circumstances of death of children to their parents. The ADT held that these public interests outweighed the public interest in the protection of personal information so that release of the information would not be unreasonable.⁵⁴ The ADT did order that the names and addresses of the individuals and other identifying material not be disclosed.

4.36 Once again, it is arguable that release of the statements was not consistent with s 18 of PPIPA. The disclosure to the child's mother was not directly related to the purpose for which the information was collected by the police (s 18(1)(a)). The makers of the statements were presumably not aware or made aware that information of the kind provided was usually disclosed to persons such as the mother (s 18(1)(b)). There was no suggestion of a threat to anyone's life or health (s 18 (1)(c)).

4.37 This review of the cases indicates that while the ADT has been prepared to construe sch 1 cl 6 broadly, to give effect to privacy protection, it has not had regard to the IPPs in PPIPA, and, in some cases,

53. *JY v Commissioner of Police* [2008] NSWADT 306.

54. *JY v Commissioner of Police* [2008] NSWADT 306, [66].

information has been released in breach of s 18 of PPIPA. To that extent it may be said that, in the handling of access applications for personal information, the FOI Act has not adequately protected the privacy of individuals. That said, submissions were received which suggested that it would be confusing and impractical for agencies deciding FOI applications to be required to have regard to s 18 and s 19 of PPIPA.⁵⁵ Other agencies in their submissions indicated that they did take s 18 and s 19 of PPIPA into account in determining FOI applications.⁵⁶

THE GIPA ACT

4.38 When it comes into force, the GIPA Act will repeal the FOI Act to introduce what the former Premier described in the Agreement in Principle speech as “a comprehensive overhaul of the freedom of information regime”.⁵⁷

4.39 Section 3 provides that the object of the GIPA 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.

Balancing the disclosure of government information and individual privacy

The statutory scheme

4.40 Section 5 of the GIPA Act creates a presumption in favour of disclosure of government information unless there is an “overriding public interest” against disclosure. The presumption, which does not exist under the FOI Act, is a matter of some concern in terms of the balancing exercise that must be undertaken between freedom of information and

55. P Youngman, *Submission*, 3, 5.

56. Sydney Olympic Park Authority, *Submission*, 2.

57. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 17 June 2009, 66 (the Hon N Rees, Premier).

privacy protection. The concern may not be that great if the presumption operates simply to tip the balance in favour of the disclosure of government information in circumstances where the competing factors are equally balanced so that it is impossible to decide one way or the other. The presumption here would apply simply to resolve an impasse. However, in the context of the Act as a whole – with its emphasis on proactive and informal disclosure – the presumption may, however, mean more than this. It may be a factor that an agency must have foremost in its mind at all stages of determining whether or not there is, in the circumstances, an overriding public interest against disclosure.

4.41 Section 9 reinforces this by providing that a person who makes an access application for government information has a legally enforceable right to be provided with access unless there is an “overriding public interest against disclosure”. Section 12 reiterates that there is a general public interest in favour of the disclosure of information, and gives examples of public interest considerations in favour of disclosure, which include that “[t]he information is personal information of the person to whom it is to be disclosed.”

4.42 Section 13 provides that there is an overriding public interest against disclosure only if there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure. In determining whether there is an overriding public interest against disclosure, an agency is entitled to take into account the applicant’s identity and relationship to any other person, the applicant’s motives and any other factors particular to the applicant.⁵⁸

4.43 Section 14(1) provides that it is to be “conclusively presumed” that there is an overriding public interest against disclosure of documents listed in sch 1, which refers, among other matters, to Cabinet information, Executive Council information, and documents protected by client legal privilege.

4.44 Section 14(2) provides that the only other considerations that may be taken into account as public interest considerations against disclosure are those listed in a table to that sub-section. Item 3 of the Table, entitled “Individual rights, judicial processes and natural justice”, is the successor

58. GIPA Act s 55.

to the privacy exemption in sch 1 cl 6 of the FOI Act. It provides relevantly as follows:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

- (a) reveal an individual's personal information,
- (b) contravene an information protection principle under the Privacy and Personal Information Protection Act 1998 or a Health Privacy Principle under the Health Records and Information Privacy Act 2002
- ...
- (g) in the case of the disclosure of personal information about a child – the disclosure of information that it would not be in the best interests of the child to have disclosed.

4.45 The result is that a person seeking to argue that information in these categories should not be disclosed must establish that, on balance, the public interest against disclosure outweighs the public interest considerations in favour of disclosure. The test is not altogether different from the requirement in sch 1 c 6 of the FOI Act that a person asserting that a document affecting personal affairs was exempt had to demonstrate that disclosure would be unreasonable. It remains to be seen whether the provisions in the GIPA Act will provide more effective privacy protection than their predecessor.

4.46 However, the NSW Privacy Commissioner and Acting NSW Information Commissioner, Judge Ken Taylor, has expressed concern that the GIPA Act does not adequately protect the personal information of third parties.⁵⁹ He notes that, as presently drafted, there is the potential for information to be disclosed in breach of s 18 of PPIPA, and, of particular concern, also in breach of s 19 of PPIPA, which protects from disclosure sensitive information as to a person's ethnic or racial origin, political opinions, and sexual activities, amongst other things. Such disclosure would constitute an erosion of privacy rights. He submits that, to ensure better privacy protection under the GIPA Act, the restrictions on disclosure in s 18 and s 19 of PPIPA should be included in sch 1 of the GIPA Act, so that there is a conclusive presumption that there is an

59. NSW Privacy Commissioner and Acting Information Commissioner, Judge Ken Taylor, *Submission*, 3.

overriding public interest against disclosure in breach of either of those provisions.⁶⁰

4.47 Against this, there are features of the GIPA Act that do seem to promote the effective protection of privacy in this State. The first is the specific inclusion of a contravention of the IPPs of PPIPA or the HPPs of HRIPA as a public interest consideration against disclosure. Under the FOI Act the fact that disclosure would contravene the IPPs or HPPs did not render the documents exempt from disclosure, and nor was that factor considered relevant in the cases on sch 1 cl 6.

4.48 Secondly, the GIPA Act regulates “personal information” instead of the narrower “personal affairs” which was used in sch 1 cl 6 of the FOI Act. The expression “personal information” is defined in sch 4 cl 4 of the GIPA Act in substantially similar terms to that in PPIPA.⁶¹

4.49 Thirdly, the GIPA Act contains detailed provision for consultation on public interest considerations that are relevant to access applications for personal information of persons other than the applicant. Section 54 of the GIPA Act, the successor to s 31 of the FOI Act, relevantly provides as follows:

- (1) An agency must take such steps (if any) as are reasonably practicable to consult with a person before providing access to information relating to the person in response to an access application if it appears that:
 - (a) the information is of a kind that requires consultation under this section, and
 - (b) the person may reasonably be expected to have concerns about the disclosure of the information, and
 - (c) those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.
- (2) Information relating to a person is of a kind that requires consultation under this section if the information:
 - (a) includes personal information about the person, ...

60. NSW Privacy Commissioner and Acting Information Commissioner, Judge Ken Taylor, *Submission*, 3, 4.

61. See para 2.5-2.7.

4.50 The purpose of the consultation is to ascertain whether the person has any objection to disclosure⁶² and the agency must take any such objection into account in determining whether there is an overriding public interest against disclosure.⁶³ If the agency decides to provide access despite an objection, it must not do so until the objector has been notified of the decision and of his or her right to have the objection reviewed.⁶⁴

Guidelines relating to the scheme

4.51 The RTA in its submission sought guidance in relation to a number of issues relating to access under the GIPA Act. The RTA receives some 2000 requests each year for information under the FOI Act. It stated that it was difficult to apply the GIPA Act public interest test to requests for information from debt collection agents, insurance companies and privately operated car parks, and submitted that it would be helpful to have some clarification about how the test relates to private commercial relationships. It also sought guidance on when it did not need to consult, and whether its procedure of consulting by letter was adequate.⁶⁵

4.52 We draw attention to the power of the Information Commissioner to issue guidelines about public interest considerations against the disclosure of government information.⁶⁶ In our view, the issues raised by the RTA are appropriately considered in such guidelines. It is to be hoped that the Privacy Commissioner would assist the Information Commissioner in the development of relevant guidelines.⁶⁷

Overseas jurisdictions

4.53 The freedom of information legislation in a number of other countries contains privacy exemptions similar to sch 1 cl 6 of the FOI

62. GIPA Act s 54(4).

63. GIPA Act s 54(5).

64. GIPA Act s 54(6).

65. RTA, *Submission*, [2.1], [2.2], [28]-[29], [36].

66. GIPA Act s 14(3).

67. We have recommended that the Privacy Commissioner should be the head of a Privacy Division within the Office of the Information Commissioner and that the power of the Privacy Commissioner to issue guidelines should be exercised with the approval of the Information Commissioner: see NSW Law Reform Commission, *The Offices of the Privacy and Information Commissioners*, Report 125 (2009) [5.11] and Recommendation 12.

Act.⁶⁸ There is a more detailed discussion of those provisions and cases that have considered them in Appendix 1 to this report.

4.54 A recurring theme in all of those jurisdictions is that where there is a conflict between the competing interests of privacy and freedom of information, what is required is a weighing up of the public interest in disclosure with the privacy interest in non-disclosure. This is the approach that has been taken in NSW by the ADT.⁶⁹

4.55 Of particular note is the approach taken by the legislation in Canada. There the relevant provisions of the *Access to Information Act 1985*⁷⁰ and the *Privacy Act 1985*⁷¹ are cross-referenced, and are to be read together in what has been described by one judge as a “seamless code”.⁷² Thus s 19 of the *Access to Information Act 1985* prohibits disclosure of personal information as defined in the *Privacy Act 1985* unless, amongst other things, the disclosure is in accordance with s 8 of the *Privacy Act*. We would urge in the same way that the GIPA Act and PPIPA be read together, and that for this reason it is desirable that the two Acts are, as far as possible, on all fours. Many of the recommendations in this report are directed to the achievement of this objective.

The Commission’s view

4.56 In our view, it is not appropriate to place the competing interests in privacy and freedom of information in any order of hierarchy. They should co-exist on a level playing field.⁷³ We have carefully considered the argument put by the NSW Privacy Commissioner that there should be included in sch 1 of the GIPA Act a conclusive presumption that there is an overriding public interest against disclosure where disclosure would

68. See *Official Information Act 1982 (New Zealand)* s 5, 9(2)(a). In England, see the *Freedom of Information Act 2000* s 40; in the United States, see Exemptions 6 and 7(C) to the *Freedom of Information Act 5 USC 552* (1966); and in Canada, see the *Access to Information Act RSC 1985c A-1*, s 19.

69. See para 4.21.

70. *Access to Information Act RSC 1985 c A-1*.

71. *Privacy Act RSC 1985 c P-21*.

72. *Dagg v Canada (Minister of Finance)* [1997] 2 SCR 403, [45].

73. See further NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009), [5.14]-[5.20].

be an unreasonable invasion of privacy.⁷⁴ On balance, however, we do not support this, because it would elevate privacy above other public interests, and in particular, it would, in our view, inappropriately, tip the balance between privacy and the right to information in favour of privacy.

4.57 What then is the likely impact of the GIPA Act on privacy protection in NSW? First, the use of the broader expression “personal information” should provide greater protection than the expression “personal affairs” did under the FOI Act. Secondly, the inclusion of contravention of an IPP or an HPP as a public interest consideration against disclosure is likely to provide a greater protection for a third party when an individual seeks access to information under the GIPA Act.

4.58 That said, the GIPA Act strengthens the individual’s right of access to government information by creating a presumption in favour of disclosure. We are concerned that this effectively tips the balance in favour of freedom of information and against privacy. That tilting may, however, occur only when there is real doubt. Further, the tilting is to some degree mitigated by the fact that principles from privacy law are now incorporated in the GIPA Act, in the Table to s 14. Whether or not this scheme will result in an appropriate balance of the interests in access to government information and in privacy will depend on how the legislation is administered in practice.

4.59 To address our concern, we recommend that when the GIPA Act is reviewed pursuant to s 130 of the GIPA Act, that review should consider the relationship between the GIPA Act and PPIPA to ensure that the Acts are interacting in an appropriate manner, which does not give primacy to either privacy or freedom of information.

4.60 Our concern in this respect will also be addressed if a strong co-operative relationship between the Information Commissioner and the Privacy Commissioner develops within a properly resourced Office of the

74. NSW Privacy Commissioner and Acting Information Commissioner, Judge Ken Taylor, *Submission*, 3.

Information Commissioner, as envisaged in our report on the Offices of the Information and Privacy Commissioners.⁷⁵

Recommendation 16

The review of the GIPA Act to take place under s 130 should expressly include consideration of the relationship between GIPA and privacy legislation, including:

- (d) whether the right of access to government information, and the presumption in favour of its disclosure, has resulted in practice in a failure adequately to protect privacy in NSW;
- (e) whether the extent of exclusion of unrecorded personal information from privacy legislation is consistent with the optimal protection of privacy in NSW; and
- (f) whether the extent of exclusion of generally available publications from privacy legislation and the GIPA Act is consistent with the optimal protection of privacy in NSW.

75. NSW Law Reform Commission, *The Offices of the Information and Privacy Commissioners*, Report 125 (2009) especially ch 5 (dealing with the functions of the Information and Privacy Commissioners within a single Office).

5. **Public officials**

- The case law
- Submissions
- The Commission's view

5.1 One of our terms of reference asks us to consider the extent to which public interest, including privacy, considerations against disclosure apply in respect of access applications for personal information of public officials. This chapter considers this issue.

THE CASE LAW

5.2 In the leading decision in NSW, *Commissioner of Police v District Court of NSW (Perrin's case)*,¹ the Court considered the application of sch 1 cl 6 of the *Freedom of Information Act 1989 (NSW)* (the "FOI Act") to applications concerning public officials.² The facts were as follows. The access applicant was the solicitor for a group of companies. The New South Wales police had sent material relating to those companies to the Queensland Criminal Justice Commission, which was inquiring into the gaming industry, with which the companies were involved. A police inquiry was later held into the circumstances surrounding the release of that information. The access applicant sought documents relating to the information supplied and the names of police responsible for supplying that information. The Commissioner provided access to those documents with names and other identifying particulars of individual police officers and public servants deleted.

5.3 The District Court upheld the access applicant's appeal from the Commissioner's decision, and the Commissioner then brought proceedings for judicial review in the Court of Appeal, alleging error of law on the face of the record. The issue before the Court was whether the disclosure of the deleted parts of the documents would involve the disclosure of the personal affairs of the police officers and departmental workers. The Court of Appeal upheld the District Court's decision that the documents should be disclosed, without deletions.

5.4 Justice Kirby drew a distinction between information relating to a public servant's personal affairs, and information relating to the performance of his or her public duties. He stated that:

The preparation of the reports apparently occurred in the course of their performance of their police duties. What would then be disclosed is no more than the identity of officers and employees of

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1. *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606 ("*Perrin's case*").
 2. For FOI Act sch 1 cl 6, see para 4.7, 4.14-4.21.

an agency performing such duties. As such, there would appear to be nothing personal to the officers concerned. Nor should there be.³

5.5 He held that the name of an officer or employee performing his or her duties could not be classified as information concerning that person's personal affairs. Thus the name of a police officer preparing a report – that is, performing his police duties – was not information concerning that officer's personal affairs and was thus not protected from disclosure.

5.6 Justice Kirby observed that “it is quite different if personnel records, private relationships, health reports or (perhaps) private addresses would be disclosed. Such information would attract the exemption.”⁴

5.7 Justice Mahoney came to a similar conclusion. He stated that:

The fact that a person is a public servant involved in a particular transaction or on duty at a particular time may, in some circumstances, “involve” the disclosure of information concerning his personal affairs ... Whether it will do so will depend upon the circumstances and what is suggested to be “involved”. In the present case, the suggestion is essentially that what will be disclosed is that the person took part in the passage of information to Queensland. That, I think, is not part of “the personal affairs” of the persons in question: it is part only of their public duties and the discharge of them. But it was submitted ... that the mere fact that a person, a public servant, performs a particular function or performed it on a particular occasion is part of “private affairs”. Special cases apart, I do not think this would be so ...⁵

5.8 The decision of the Court of Appeal in *Perrin's case* has been applied on a number of occasions in relation to the disclosure of the names of public servants.⁶ So, for example, in *A v Director-General, Department of Health*⁷ a doctor in a public hospital argued that his name appearing in an investigation report dealing with his alleged non-attendance at work and related salary payments constituted his “personal affairs” and should not be disclosed. The ADT rejected this argument,

3. *Perrin's case*, 625.

4. *Perrin's case*, 625.

5. *Perrin's case*, 638-9.

6. See Thomson Reuters, *New South Wales Administrative Law* vol 1 [32.3575] for a discussion of some of the cases. See also *State of Queensland v Albietz* [1996] 1 Qd R 215.

7. *A v Director-General, Department of Health* [2000] NSWADT 59.

holding that neither his name nor other material in the report concerned his personal affairs, but rather his employment in a public agency.

5.9 In *Robinson v Director-General, Department of Health*,⁸ the ADT held that the disclosure of an application by a psychologist in the public service was not information concerning the “personal affairs” of that person, as the information related to the person’s professional position.⁹

5.10 These cases suggest that privacy considerations do apply to access applications for personal information of public servants. Critical to the determination of applications concerning public servants is whether the information sought to be disclosed relates to the performance of their duties as public servants, in which case it is not exempt, or to their personal affairs, in which case it is.

SUBMISSIONS

5.11 The Commission received a number of submissions in response to its query as to whether agencies applied different principles where the application was for personal information about public officials. Some submissions stated that the agency dealt with applications for personal information about public officials in the same way as it dealt with other applications for personal information.¹⁰ Others argued that where the information was in relation to a public official in his or her public capacity, there should be a strong presumption in favour of disclosure, but where it concerned a public official in his or her private capacity, the same principles should apply as applied to other applications.¹¹

5.12 The Department of Premier and Cabinet provided a lengthy submission on this issue. It stated that :

the considerations for and against disclosure tend to be more finely balanced where the application relates to documents containing the personal information of a Minister or other public official. In such cases, the public interest in transparency and accountability is a significant factor which must be weighed against the countervailing privacy concerns of individual public officials.¹²

8. *Robinson v Director-General, Department of Health* [2002] NSWADT 222.

9. *Robinson v Director-General, Department of Health* [2002] NSWADT 222, [94].

10. Office of State Revenue, *Submission*, 2.

11. Public Interest Advocacy Centre, *Submission*, 6.

12. NSW Government Department of Premier and Cabinet, *Submission*, 2.

The Department referred to a number of instances where applications had been made for personal information about public officials. One example was an application for access to documents containing details of government-subsidised air travel for former Ministers. In accordance with s 31 of the FOI Act, the Department consulted the former Ministers, some of whom objected to the release of details relating to the exact dates and destinations of the travel. Ultimately the documents were released, but details as to the date of travel and the destination were deleted.

THE COMMISSION'S VIEW

5.13 The cases we have discussed in this chapter were decided under the exemption from the FOI Act of documents that concern individuals' "personal affairs". Both the *Privacy and Personal Information Protection Act 1998* (NSW) ("PPIPA") and the *Government Information Public Access Act 2009* (NSW) (the "GIPA Act") relevantly refer to "personal information" rather than "personal affairs", and there is no doubt that information that identifies a public official in connection with his public responsibilities is "personal information",¹³ a public interest consideration against disclosure under the GIPA Act.¹⁴ This does not mean, however, that the information will be protected from disclosure under the GIPA Act: that depends on whether, on balance, the public interest against disclosure outweighs the public interest in favour of disclosure.¹⁵ It is here that the trend in the cases cited above becomes relevant. That trend, supported in submissions, establishes that, in striking the balance, information in relation to a public official in his or her public capacity will, generally, be more readily disclosed than information concerning a public official in his or her private capacity. We support this. The reasons go to the heart of the policies underlying the opening up of government information to the public, especially the public interest in the transparency of the workings of government. And the balance struck in the cases will, we feel sure, be replicated under the GIPA Act.

5.14 As currently drafted the GIPA Act seeks to ensure that the balance in one narrow group of cases involving public officials will be struck in favour of disclosure. Clause 4(3)(b) of sch 4 of the GIPA Act excepts from the definition of "personal information" "information about an individual

13. *WL v Randwick Council* [2007] NSWADTAP 58, [20].

14. GIPA Act s 14 Table item 3(a), on which see para 4.44.

15. GIPA Act s 13.

(comprising the individual's name and non-personal contact details) that reveals nothing more than that the person was engaged in the exercise of public functions". We have recommended that this provision be repealed.¹⁶ Its appearance not only creates an inexplicable difference between the exceptions to the definitions of "personal information" in the GIPA Act and privacy legislation, but also runs the risk of making such information too easily disclosable by removing it from the context of the balancing process where it properly belongs. For example, if the information contains no more than the name of the public official, it may be thought, applying cl 4(3)(b), that the information is outside the protection of the GIPA Act, and so can be disclosed. And this might mean that inadequate consideration is given to the force of other considerations against disclosure that are relevant in the circumstances – for example, that there is a risk of harm to the public official in question.¹⁷

5.15 If it is thought necessary to include the narrow exception in cl 4(3)(b) of sch 4 of the GIPA Act in the legislation in order to stress the importance of transparency, we would recommend that it be stated as an exception to "personal information" in item 3(a) of the Table to s 14. This is the context in which the "exception" is naturally relevant. We do, however, stress that including the "exception" in this way is strictly unnecessary: the structure of the GIPA Act itself sufficiently achieves the desired result in the balancing process that it requires.¹⁸

Recommendation 17

If Recommendation 8 is implemented, item 3(a) of the Table to Section 14 of GIPA may be amended to include the following words: "other than information about an individual (comprising the individual's name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions".

16. See Recommendation 8.

17. See GIPA Act s 14 Table item 3(f).

18. Consider further *Corporate Officer of the House of Commons v The Information Commissioner* [2008] EWHC 1084 (see para A.10-A.13).

Appendices

- Appendix A: A comparison with other jurisdictions
- Appendix B: Part 6A Amendment of records
- Appendix C: Submissions and consultations
- Appendix D: Submissions to CP 3

Appendix A: A comparison with other jurisdictions

A.1 The freedom of information legislation in a number of other countries contains privacy exemptions similar to sch 1 cl 6 of the FOI Act.

New Zealand

A.2 Freedom of information in New Zealand is dealt with by the *Official Information Act 1982* (NZ). Section 4 provides that one of the purposes of the Act is “to protect official information to the extent consistent with the public interest and the preservation of personal privacy”. Section 5 creates a “principle of availability” in the following terms:

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

A.3 Access to personal information of persons other than the applicant is dealt with in s 9, which contains a list of reasons for withholding information. Pursuant to s 9(2)(a), one of those reasons is privacy protection. It provides as follows:

- (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.
- (2) Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to—
 - (a) protect the privacy of natural persons, including that of deceased natural persons; ...

A.4 Accordingly, where the withholding of information is necessary to protect the privacy of natural persons, that is a good reason for withholding the official information unless that interest is outweighed by other considerations which make it desirable in the public interest to make the information available. It has been said that the test is one of

assessing the weight of the competing interests of disclosure and protection of privacy in the circumstances of the particular case.¹

A.5 It has been suggested that in determining whether such necessity exists, agencies might have regard to Principle 11 of the *Privacy Act 1993* (NZ), entitled “Limits on disclosure of personal information” which is in similar, though not identical terms to section 18 of PPIPA.²

A.6 There is little judicial authority on section 9(2)(a). Most of the law on the reasons for withholding information has been developed by the Ombudsman, whose decisions have been cited by the Court of Appeal.³

A.7 One such decision is *Case No C 002* where the applicant, who had been adopted shortly after birth and had had no contact with his birth mother, sought medical records relating to his birth from the hospital where he was born.⁴ The Ombudsman upheld the hospital’s decision to provide him with records relating to his birth with the deletion of details of his birth mother, and to withhold the mother’s medical records. Applying s 9(2)(a), the Ombudsman held that the information was private to the birth mother and it was necessary to withhold it to prevent an unwarranted disclosure of her affairs.

England

A.8 In England, the potential conflict between freedom of information and privacy protection has been reconciled in section 40 of the *Freedom of Information Act 2000*. It provides, in somewhat convoluted terms, that information may be exempt from disclosure where it is personal data (defined in s 1(1)) whose disclosure would contravene one of the data protection principles in the *Data Protection Act 1998*.

A.9 Thus, in the words of Lord Rodger in the recent opinion on the analogous Scottish provision *Common Services Agency v Scottish Information Commissioner*, when Parliament enacted the *Freedom of Information Act 2000* it “did not destroy, but built upon, the system

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1. A Satyanand, “Interface between the Official Information and Privacy Acts” (2002) 9 *Privacy Law & Policy Reporter* 8.
 2. B Slane, “Freedom of Information and Privacy” (2002) 9 *Privacy Law & Policy Reporter* 5, 7.
 3. LexisNexis, *Laws of New Zealand Information* [59] (at 7 July 2009).
 4. *Case No C 002* [1989] 9 CCNO 182.

created by the [*Data Protection Act*] 1998” by “graft(ing) on to it provisions for third parties to obtain information without the operation of the pre-existing system of protection for data subjects being compromised”.⁵ In New South Wales, the legislation was enacted in the opposite order, with the FOI Act preceding PPIPA.

A.10 Section 40 has not been the subject of much judicial consideration.⁶ One recent case which does discuss it is *Corporate Officer of the House of Commons v The Information Commissioner*, where there was an appeal from a decision of the Information Tribunal granting access to information relating to an allowance (called the ACA) paid to Members of Parliament for expenses incurred by them when staying overnight away from their main residence for the purpose of their parliamentary duties.⁷

A.11 The Court noted that, pursuant to section 40, where a request was made for personal data (as defined) it may be exempt from disclosure if its disclosure would contravene one of the data principles in the *Data Protection Act 1998*. The relevant principle was that information should be processed fairly and lawfully, and in accordance with certain conditions, the relevant one being that “the processing is necessary for the purposes of legitimate interests pursued by ... the third party to whom the data are disclosed.” The Court observed that “the issue in a nutshell is the potential conflict between the entitlement to information created by the [*Freedom of Information Act*] and the rights to privacy encapsulated in the [*Data Protection Act*].”⁸

A.12 The Tribunal had ordered that notwithstanding the entitlement of MPs to their privacy, access should be given, because the ACA system was deeply flawed. On appeal from the Tribunal, the Court held that there was thus a legitimate public interest in the applications, as “[t]he expenditure of public money through the payment of MPs’ salaries and

5. *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550, [63].

6. For two decisions of the Information Tribunal, see *Ministry of Defence v Information Commissioner* Appeal Number EA/2006/0027 and *Bluck v Information Commissioner* Appeal Number EA/2006/0090.

7. *Corporate Officer of the House of Commons v The Information Commissioner* [2008] EWHC 1084.

8. *Corporate Officer of the House of Commons v The Information Commissioner* [2008] EWHC 1084, [13].

allowances is a matter of direct and reasonable interest to taxpayers”.⁹ The Court upheld the Tribunal’s decision that the information should be disclosed, notwithstanding that it would involve disclosing the residential addresses of some Members of Parliament. It held that the disclosure of an individual’s private address under the Freedom of Information Act did require justification, but in the instant case “there was a legitimate public interest well capable of providing such justification”.¹⁰

A.13 Interestingly, the Court held that if the arrangements for oversight and control of the ACA system were to change, then the issues of privacy and security for MPs and their families might lead to a different conclusion.

The United States

A.14 The privacy exemptions under the *Freedom of Information Act*¹¹ are contained in Exemption 6¹² and Exemption 7(C).¹³ Exemption 6 deals with “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”. Exemption 7(C) deals with “records or information compiled for law enforcement purposes ... to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy”. The burden of establishing the requisite invasion of privacy to support an Exemption 6 claim is heavier than the standard applicable to an Exemption 7 claim,

9. *Corporate Officer of the House of Commons v The Information Commissioner* [2008] EWHC 1084 [15].

10. *Corporate Officer of the House of Commons v The Information Commissioner* [2008] EWHC 1084 [42].

11. 5 USC 552 (1966). For a detailed consideration of the leading Supreme Court cases on these exemptions, see M Halstuk and B Chamberlin, “The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public’s Interest in Knowing What the Government’s Up to” (2006) 11 *Communication Law and Policy* 511.

12. 5 USC 552(b)(6).

13. 5 USC 552(b)(7)(c).

because the Government must establish that the invasion of privacy was “clearly” unwarranted.¹⁴

A.15 The Supreme Court has held that the Freedom of Information Act was designed “to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny”.¹⁵ Consistently with that purpose, exemptions are to be construed narrowly,¹⁶ and the strong presumption in favour of disclosure places the burden on the agency to justify withholding any of the requested documents.¹⁷ In relation to Exemption 6, the Supreme Court has held that, in determining whether a particular disclosure would be a “clearly unwarranted invasion of personal privacy”, the Court must balance an individual’s right to privacy against the public interest in opening “agency action to the light of public scrutiny”.¹⁸ That is the only relevant public interest to be weighed up in the balancing process.¹⁹

A.16 In one of the leading cases on Exemption 7(C), *United States Department of Justice v Reporters Committee For Freedom of the Press*,²⁰ the Supreme Court held that the privacy interest protected by that exemption was an interest in “keeping personal facts away from the public eye”.²¹ It further held that whether disclosure of a private document under exemption 7(C) was warranted depended on the “nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act ‘to open agency action to the light of public scrutiny’”.²² The Court held that:

Official information that sheds light on an agency’s performance of its statutory duties falls squarely within the statutory purpose. That

14. *United States Department of State v Ray* 502 US 164, 172 (1991); *National Archives and Records Administration v Favish* 541 US 157, 165-6 (2004).

15. *Department of Air Force v Rose* 425 US 352, 361 (1976), quoting *Rose v Department of the Air Force* 495 F 2d 261, 263 (Court of Appeals, Second Circuit, 1974).

16. *Wood v FBI* 432 F 3d 78, 82 (2005).

17. *Wood v FBI* 432 F 3d 78, 82 (2005); *United States Department of Justice v Reporters Committee For Freedom of the Press* 489 US 749, 755 (1989).

18. *United States Department of State v Ray* 502 US 164, 175 (1991).

19. *Bibles v Oregon Natural Desert Association* 519 US 355 (1997).

20. 489 US 749 (1989) (“*Reporters Committee*”).

21. *Reporters Committee*, 769.

22. *Reporters Committee*, 772.

purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct"²³

A.17 The Supreme Court again considered Exemption 7(C) in *National Archives and Records Administration v Favish*, a case concerning an official investigation into the circumstances surrounding the death of Vince Foster, then White House Deputy Counsel and a close friend of President Clinton's.²⁴ A number of investigations had concluded that his death was by suicide, but conspiracy theories abounded, and Favish, an attorney, sought access under the Freedom of Information Act to photographs from the death scene and the autopsy. The government refused disclosure on the ground of Exemption 7(C).

A.18 The Court held that Exemption 7(C) extended to Mr Foster's family, who objected to disclosure, observing that the family members invoked their own right to personal privacy "... to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquillity".²⁵ The Court was then required to decide whether the disclosure could reasonably be expected to constitute an "unwarranted invasion" of the family's personal privacy. This required it to balance the family's privacy interest against the public interest in disclosure.²⁶

A.19 The Court established the following two-pronged test to determine what the applicant for disclosure must demonstrate:

First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest.²⁷

A.20 The Court further held that where there was a privacy interest protected by Exemption 7(C) and the public interest asserted was to show that responsible officials acted negligently or improperly in the performance of their duties, the access applicant must establish "more than a mere suspicion". He or she must "produce evidence that would

23. *Reporters Committee*, 773.

24. *National Archives and Records Administration v Favish* 541 US 157 (2004) ("*Favish*").

25. *Favish*, 166.

26. *Favish*, 171, 172.

27. *Favish*, 172.

warrant belief by a reasonable person that the alleged Government impropriety might have occurred.”²⁸ The Court referred to a “presumption of legitimacy” accorded to the Government’s official conduct, then held that the access applicant had not produced any evidence to warrant a belief that the alleged Government impropriety might have occurred.

A.21 Exemptions 6 and 7 were recently considered in *Associated Press v United States Department of Defence*.²⁹ There the applicant sought access to documents relating to the abuse of detainees at Guantanamo Bay by military personnel and other detainees. The respondent had produced documents that deleted any material identifying the detainees. The Court held that both the detainees who had been allegedly abused and the alleged abusers had a measurable privacy interest in the non-disclosure of their names and other identifying information. It then considered whether disclosure would further the public interest so that it would be a warranted invasion of their privacy. The Court referred to *Favish*, then considered whether the public interest would be served by disclosure of the detainees’ names and identifying information and, if so, whether that interest outweighed the detainees’ privacy interest in non-disclosure. The Court held that such disclosure would only “modestly” further the public interest, which was “significantly” outweighed by the detainees’ privacy interest.³⁰ The Court thus found that Exemption 7 applied, so it did not need to consider Exemption 6.³¹

A.22 Some commentators in the United States argue that, in attempting to balance the competing interests of privacy and freedom of information, the Supreme Court has tipped the scales too heavily in favour of privacy.³²

28. *Favish*, 174.

29. *Associated Press v United States Department of Defence* 554 F 3d 274 (2009).

30. *Associated Press v United States Department of Defence* 554 F 3d 274, 289 (2009),

31. *Associated Press v United States Department of Defence* 554 F 3d 274, 291 (2009).

32. For a strong criticism of the Supreme Court’s decisions on this basis, see M Halstuk and B Chamberlin, “The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public’s Interest in Knowing What the Government’s Up to” (2006) 11 *Communication Law and Policy* 511, 563.

Canada

A.23 The *Access to Information Act 1985* contains the privacy exemption analogous to sch 1 cl 6 of the FOI Act, which provides as follows:³³

19(1) Subject to sub-section (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

- (a) the individual to whom it relates consents to the disclosure;
- (b) the information is publicly available; or
- (c) the disclosure is in accordance with section 8 of the *Privacy Act*.

A.24 Section 3 of the *Privacy Act* defines “personal information” broadly to mean “information about an identifiable individual that is recorded in any form”, with a list of inclusions and exclusions.

A.25 Section 8(2) contains a list of circumstances in which information may be disclosed, including where the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure.³⁴

A.26 Section 19 has been the subject of judicial consideration by the Supreme Court in two relatively recent decisions.

A.27 In *Dagg v Canada (Minister of Finance)*,³⁵ the appellant sought access to logs with the names, identification numbers and signatures of employees entering and leaving the workplace on weekends. The Minister provided the logs but deleted names, identification numbers and signatures on the basis that this was personal information and thus exempt from disclosure under s 19(1) of the Act. A majority allowed the appeal from the Federal Court of Appeal, which had held that the documents were exempt. Justice La Forest wrote the dissenting judgment, with which the majority agreed on the following two points. First, that the *Access to Information Act* and the *Privacy Act* must be interpreted and

33. RSC 1985 c A-1.

34. *Privacy Act* RSC 1985 cP-21, s 8(2)(m)(i).

35. *Dagg v Canada (Minister of Finance)* [1997] 2 SCR 403 (“Dagg”).

read together, and secondly that the names on the sign-on log were “personal information”.³⁶ The majority held however that the names fell within one of the exclusions to the definition of “personal information” in s 3 of the *Privacy Act*, and should therefore be disclosed. The dissenters disagreed.

A.28 Justice La Forest, with whom the majority agreed on this point, held that the appeal involved “a clash between two competing legislative policies – access to information and privacy.” He said:

“[R]ecognising the conflicting nature of governmental disclosure and personal privacy, Parliament attempted to mediate this discord by weaving the Access to Information Act and the Privacy Act into a seamless code ... While the two statutes do not efface the contradiction between the competing interests ... they do set out a coherent and principled mechanism for determining which value should be paramount in a given case.”³⁷

A.29 Justice La Forest noted that, by reason of the prohibition in s 19 on the disclosure of any record that contains personal information as described in the *Privacy Act*, personal information was specifically exempted from the general rule of disclosure. Thus both statutes recognised that, “in so far as it is encompassed by the definition of ‘personal information’ in s 3 of the *Privacy Act*, privacy is paramount over access.”³⁸ He held that the *Privacy Act* and the *Access to Information Act* had equal status, and that the purposes of both should be given equal effect.³⁹

A.30 In *Information Commissioner of Canada v Commissioner of the Royal Canadian Mounted Police*⁴⁰ Justice Gonthier, who delivered the judgement of the Court, referred to Justice La Forest’s judgment in *Dagg’s* case and emphasised that where the court had to resolve a conflict between the *Privacy Act* and the *Access to Information Act*, the two Acts “ha[d] to be

36. *Dagg*, [1]. For a useful discussion of the decision, see D Kratchanov, “Access Over Privacy or Privacy Over Access: Did the Supreme Court Decide One Had Precedence Over the Other?” (2002) 15 *Canadian Journal of Administrative Law and Practice* 213.

37. *Dagg*, [45].

38. *Dagg*, [48].

39. *Dagg*, [51] and [55].

40. *Information Commissioner of Canada v Commissioner of the Royal Canadian Mounted Police* [2003] 1 SCR 66.

read jointly and that neither takes precedence over the other”.⁴¹ He stated that the two Acts were “a seamless code with complementary provisions that can and should be read harmoniously”.⁴² In that case, the Court held that the Respondent should disclose to the appellant the list of postings by date, years of service and list of ranks of four of its members. The information was “personal information” under section 3 of the *Privacy Act*, but it fell within the exemption in section 3(j) of that Act.

41. *Information Commissioner of Canada v Commissioner of the Royal Canadian Mounted Police* [2003] 1 SCR 66, [21].

42. *Information Commissioner of Canada v Commissioner of the Royal Canadian Mounted Police* [2003] 1 SCR 66, [22].

Appendix B: PPIPA Part 6A Amendment of records

59A Interpretation

(1) In this Part:

GIPA Act means the *Government Information (Public Access) Act 2009*.

(2) Words and expressions used in this Part that are defined in the GIPA Act have the same meanings as in that Act.

59B Right to apply for amendment of agencies' records

A person to whom access to a record held by an agency has been given may apply for the amendment of the agency's records:

- (a) if the record contains information concerning the person's personal affairs, and
- (b) if the information is available for use by the agency in connection with its administrative functions, and
- (c) if the information is, in the person's opinion, incomplete, incorrect, out of date or misleading.

59C Applications for amendment of agencies' records

An application for the amendment of an agency's records:

- (a) shall be in writing, and
- (b) shall specify that it is made under this Act, and
- (c) shall contain such information as is reasonably necessary to enable the record held by the agency to which the applicant has been given access to be identified, and
- (d) shall specify the respects in which the applicant claims the information contained in the record to be incomplete, incorrect, out of date or misleading, and
- (e) if the application specifies that the applicant claims the information contained in the record to be

incomplete or out of date—shall be accompanied by such information as the applicant claims is necessary to complete the agency’s records or to bring them up to date, and

- (f) shall specify an address in Australia to which notices under this Act should be sent, and
- (g) shall be lodged at an office of the agency.

59D Persons by whom applications to be dealt with etc

- (1) An application shall be dealt with on behalf of an agency:
 - (a) by the principal officer of the agency, or
 - (b) by such other officer of the agency as the principal officer of the agency may direct for that purpose, either generally or in a particular case.
- (2) Notwithstanding subsection (1), an application for the amendment of a local authority’s records shall be dealt with on behalf of the authority:
 - (a) by the principal officer of the authority, or
 - (b) by such other officer of the authority as the authority may, by resolution, direct for that purpose, either generally or in a particular case.
- (3) An application shall be dealt with as soon as practicable (and, in any case, within 21 days) after it is received.

59E Incomplete applications

An agency shall not refuse to accept an application merely because the application does not contain sufficient information to enable the record held by the agency to which the applicant has been given access to be identified without first taking such steps as are reasonably practicable to assist the applicant to provide such information.

59F Determination of applications

- (1) An agency shall determine an application:
 - (a) by amending its records in accordance with the application, or
 - (b) by refusing to amend its records.
- (2) An agency that fails to determine an application within 21 days after the application is received by the agency shall, for the purposes of section 47 and other provisions of this Act, be taken to have determined the application by refusing to amend its records in accordance with the application.

59G Refusal to amend records

An agency may refuse to amend its records in accordance with an application:

- (a) if it is satisfied that its records are not incomplete, incorrect, out of date or misleading in a material respect, or
- (b) if it is satisfied that the application contains matter that is incorrect or misleading in a material respect, or
- (c) if the procedures for amending its records are prescribed by or under the provisions of a legislative instrument other than this Act, whether or not amendment of those records is subject to a fee or charge.

59H Notices of determination

- (1) An agency shall cause written notice to be given to the applicant:
 - (a) of its determination of his or her application, or
 - (b) if the application relates to records that are not held by the agency—of the fact that the agency does not hold such records.

- (2) Such a notice shall specify:
- (a) the day on which the determination was made, and
 - (b) if the determination is to the effect that amendment of the agency's records is refused:
 - (i) the name and designation of the officer by whom the determination was made, and
 - (ii) the reasons for the refusal, and
 - (iii) the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based, and
 - (iv) the rights to review under the GIPA Act conferred by this Part in relation to the determination, and and
 - (v) the procedures to be followed for the purpose of exercising those rights.
- (3) An agency is not required to include in a notice any matter that is of such a nature that its inclusion in the notice would result in the disclosure of information for which there is an overriding public interest against disclosure.

59I Notations to be added to records

- (1) If an agency has refused to amend its records, the applicant may, by notice in writing lodged at an office of the agency, require the agency to add to those records a notation:
- (a) specifying the respects in which the applicant claims the records to be incomplete, incorrect, out of date or misleading, and
 - (b) if the applicant claims the records to be incomplete or out of date—setting out such information as the applicant claims is necessary

to complete the records or to bring them up to date.

- (2) An agency shall comply with the requirements of a notice lodged under this section and shall cause written notice of the nature of the notation to be given to the applicant.
- (3) If an agency discloses to any person (including any other agency and any Minister) any information contained in the part of its records to which a notice under this section relates, the agency:
 - (a) shall ensure that there is given to that person, when the information is disclosed, a statement:
 - (i) stating that the person to whom the information relates claims that the information is incomplete, incorrect, out of date or misleading, and
 - (ii) setting out particulars of the notation added to its records under this section, and
 - (b) may include in the statement the reason for the agency's refusal to amend its records in accordance with the notation.
- (4) Nothing in this section is intended to prevent or discourage agencies from giving particulars of a notation added to its records under this section to a person (including any other agency and any Minister) to whom information contained in those records was given before the commencement of this section.

59J Right of Review under GIPA Act

A person who is aggrieved by a determination of an agency under this Part is entitled to a review of the determination under Part 5 of the GIPA Act as if the determination were a reviewable decision under that Part.

Appendix C: Submissions and consultations

South Eastern Sydney and Illawarra Area Health Service, 16 July 2009

Sydney Olympic Park Authority, 31 July 2009

Mr Phillip Youngman, 3 August 2009

Office of the Privacy Commissioner, 20 August 2009

Office of State Revenue, 21 August 2009

NSW Department of Community Services, 26 August 2009

NSW Police Force, 26 August 2009

State Records Authority of NSW, 27 August 2009

Public Interest Advocacy Centre, 28 August 2009

Ms Megan Carter, 31 August 2009

University of Sydney, 31 August 2009

Legal Aid, 31 August 2009

NSW Government Department of Premier and Cabinet, 31 August 2009

Australian Press Council, 31 August 2009

Law Society of NSW, 31 August 2009

State Library of New South Wales, 31 August 2009

Community Relations Commission, 1 September 2009

Stepan Kerkyasharian, President of the Anti-Discrimination Board of NSW, 3 September 2009

Judge KV Taylor, NSW Privacy Commissioner and Acting NSW Information Commissioner, 4 September 2009, 21 October 2009, 22 October 2009

Roads and Traffic Authority, 7 September 2009

Cyberspace Law and Policy Centre, 22 September 2009

Privacy NSW, 22 September 2009

Housing NSW, 24 September 2009

NSW Police Force, 22 September 2009

NSW Department of Corrective Services, 28 September 2009

Department of Ageing, Disability & Home Care, received 13 October 2009

NSW Department of Health (undated)

Ms Kaye Sato, Office of the Information Commissioner,
26 November 2009

Mr John McAteer, Privacy NSW, 26 November 2009

Cyberspace law and Policy Centre, 30 November 2009

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Justice Health, NSW Health, 15 October 2008

NSW Commission for Children & Young People, 15 October 2008

NSW Department of Primary Industries, 15 October 2008

Motor Accidents Authority of NSW, 16 October 2008

Australian Press Council, 17 October 2008

Legal Aid NSW, 17 October 2008

NSW Department of Corrective Services, 17 October 2008

Law Society of NSW, 21 October 2008

Office of Fair Trading, NSW Department of Commerce, 22 October 2008

State Records Authority of NSW, 23 October 2008

NSW FOI/Privacy Practitioners' Network, 28 October 2008

NSW Department of Ageing, Disability & Home Care, 30 October 2008

NSW Minister for Community Services, 30 October 2008

Australian Privacy Foundation, 31 October 2008

Cyberspace Law & Policy Centre, University of NSW, 3 November 2008

HIV/AIDS Legal Centre, 4 November 2008

Intellectual Disability Rights Service, 5 November 2008

Office of Industrial Relations, NSW Department of Commerce,
7 November 2008

Inner City Legal Centre, 10 November 2008

Consumer Credit Legal Centre (NSW) Inc, 13 November 2008

NSW Guardianship Tribunal, 17 November 2008

Privacy NSW, Office of the NSW Privacy Commissioner,
28 November 2008

Public Interest Advocacy Centre Ltd, 24 December 2008

NSW Department of Education and Training, 2 February 2009

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<i>Commissioner of Police v District Court of NSW</i> (1991) 31 NSWLR 606	2.9, 4.14, 4.17, 4.18, 4.20, 5.2-5.8
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