



information
and privacy
commission
new south wales



Mr David Thodey
Chair
Independent Review of the APS

By email: apsreview@pmc.gov.au

Dear Mr Thodey,

Information Commissioner's comments on Priorities for Change in the APS

The purpose of this correspondence is to respond to the opportunity presented to provide feedback in respect of the report entitled *Independent Review of the APS: Priorities for Change* (19 March 2019) (**the Report**). The following comments are provided for your consideration.

Priority: develop stronger internal and external partnerships – An open APS, accountable for sharing information and engaging widely

Second National Action Plan – Citizen survey on right to access government information

As NSW Information Commissioner I consider a strong public service is one that encourages transparency through the release of information, including data in the public interest. Transparency and accountability coupled with strong, institutionalised mechanisms for public participation within the public sector are essential features of open government. For open government to flourish proactive mechanisms should be mandated for both the release of information and public engagement.

On behalf of the Association of Information Access Commissioners (**AIAC**), I engaged with the Department of Prime Minister and Cabinet in the development of new commitments for inclusion in the second Australian National Action Plan 2018-20, released on 21 September 2018. The Information and Privacy Commission NSW (**IPC**) is leading a further commitment in the second NAP to engage States and Territories to better understand information access through data. This commitment will provide for subnational participation in the Open Government Partnership process to build understanding of information access frameworks. This will be achieved by:

1. Facilitating administrative arrangements between State and Territory governments and Australian Government officials responsible for Australia's Open Government commitments to support collaboration and learning on open government matters (including highlighting the opportunity for formal subnational cooperation and membership in the Open Government partnership); and

2. Engaging with Information Commissioners and Ombudsmen to seek agreement to conduct surveys to measure citizens' awareness of the right to access government information, and their experiences and outcomes in exercising that right. These surveys will inform activities to promote and support the right to access government information.

The citizen survey measures the value that citizens place on the right to access government information, their awareness of that right, and their experiences and outcomes in exercising that right. The IPC has engaged with other information access jurisdictions in Australia to develop the survey questions. The survey will be conducted in April 2019 and the findings shared broadly during Right to Know Week in September 2019.

Open Government – GIPA Act

The GIPA sets a mandate for open government. The object of the Act is to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective. The object of the Act is to open government information to the public by:

1. Authorising and encouraging the proactive public release of government information by agencies
2. Giving members of the public an enforceable right to access government information
3. Providing that access to government information is restricted only when there is an overriding public interest against disclosure.

The GIPA Act designates four information release pathways. They include release of government information informally to a person, release in response to a formal access application and mandatory and authorised proactive release of government information.

Under the GIPA Act there is a general public interest in favour of the disclosure of government information. The GIPA Act provides for a balancing of considerations in favour of and against disclosure, having regard to the public interest. This is known as the 'public interest test'. The test requires consideration of:

1. The presumption in favour of release of government information;
2. Identification of factors in favour of disclosure;
3. Identification of factors against disclosure; and
4. Balancing of factors to determine where the public interest lies.

There is an overriding public interest against disclosure of government information if (and only if) there are public interest considerations against disclosure and, on balance; those considerations outweigh the public interest considerations in favour of disclosure.

Open Data Guideline

My office is also developing a guideline for issue under section 12(3) of the *Government Information (Public Access) Act 2009 (GIPA Act)* for the assistance of NSW Government agencies in considering public interest considerations in favour of the disclosure of information. The guideline provides information and assistance to public sector agencies and citizens regarding open data, including the definitions of 'open data' and 'opening data' and release of government data using the access to information pathways under the GIPA Act.

The Guideline also recognises the requirement for responsible stewardship of information including a presumption in favour of disclosure; consideration of factors in favour of and against disclosure of information. This approach to determining the public interest in release of information is a mature and well developed statutory model that has adapted to rapid technological change largely because the definitions contained within the GIPA Act are technologically neutral. In my view, and as NSW Open Data Advocate, I consider a firm principle of modern government is that it should use information, which is a valuable asset, for democratic, economic and social advancement. Using information strategically involves appropriate sharing – within government, with other governments, and with business and the community. My role as Open Data Advocate aligns with my role under the GIPA Act of promoting open government, including through proactive disclosure practices.

Information sharing is most effectively done in the modern age through technological channels, such as websites and data bases. Open data enables governments to be transparent, collaborative and innovative. The NSW Government has endorsed this approach through its *Information Management Framework*¹ and *Open Data Policy*².

Open Government – National FOI Metrics

Published on the IPC's website is a dashboard of metrics on public use of freedom of information (FOI) access rights.³ They enable the community to examine the performance of their local FOI laws and to advocate accordingly. The metrics were developed as a result of a commitment of Australia's first Open Government National Action Plan to develop uniform metrics on public use of FOI access rights to promote the importance of better measuring and improving our understanding of the public's use of rights under freedom of information laws.

Open Government – Key Features of FOI Laws

As part of the examination by Australian jurisdictions of FOI access rights and proactive release of government information, my office has led a project for the AIAC exploring the key features of right to information (RTI) legislation. The key features present an aspirational expression of an effective and efficient RTI/FOI legal framework.

¹ <https://www.digital.nsw.gov.au/sites/default/files/IM%20Framework%20infographic_0.pdf>

²

<https://www.digital.nsw.gov.au/sites/default/files/NSW_Government_Open_Data_Policy_2016.pdf>

³ <<https://www.ipc.nsw.gov.au/news/release-inaugural-dashboard-and-metrics-publics-use-foi-laws>>

The key features framework has been developed in recognition that RTI/FOI legislation is an essential mechanism to enable members of the public the opportunity to scrutinise the actions of government. Giving people access to the information used by policy makers and governments provides a meaningful level of accountability and induces a much higher level of public participation, awareness and interest in policy-making and government itself.

The key features have been developed by drawing on:

1. Commitments that promote transparency and information access outlined in Australia's Open Government Partnership National Action Plan 2016-18, and Open Government Partnership National Action Plan 2018-20
2. Agreed standards promulgated by international bodies such as United Nations, the Organisation of American States, the Council of Europe, the Organisation for Security and Cooperation in Europe and the African Union
3. Academic commentary from recognised experts in FOI/RTI legislation, and key indicators for a right to access information legal framework developed by Access Info Europe and the Centre for Law and Democracy.⁴

Open Government – Engagement and Charter for Public Participation

Finally, I note the GIPA Act requires NSW government agencies to make open access information publicly available. Such information includes an 'agency information guide' that must contain information about any arrangements that exist to enable members of the public to participate in the formulation of the agency's policy and the exercise of the agency's functions, among other things.⁵

In June 2018, I released the *Charter for Public Participation – a guide to assist agencies and promote citizen engagement*⁶ (**the Charter**), which could be considered as a model strategy for proactive engagement.

The Charter assists NSW agencies in seeking effective public input into the development and delivery of policies and services. It provides a practical and principle-based approach for embedding public participation in agency decision-making frameworks and policy development. It brings together leading authorities and resources to build capacity and guide the NSW public sector in engaging with the community. The Charter is underpinned by the GIPA Act, which has as its object to advance government that is open, accountable, fair and effective.

I hope these comments are of assistance. They are provided with a view to assisting the consideration of 'priority: develop stronger internal and external partnerships' through an open APS, accountable for sharing information and engaging widely.

⁴ Please contact my office, should you wish to view a copy of the key features document.

⁵ Section 20(1) of the GIPA Act.

⁶ <https://www.ipc.nsw.gov.au/information-access/open-government-open-data-public-participation/charter-public-participation-guide-assist-agencies-and-promote-citizen-engagement>

Please do not hesitate to contact me if you have any queries. Alternatively, your officers may contact Sarah Wyatt, Assistant Director, Legal Counsel and Regulatory Advice on 1800 472 679 or by email at sarah.wyatt@ipc.nsw.gov.au.

Yours sincerely

Elizabeth Tydd
Information Commissioner
IPC, CEO