T R A N S C R I P T

INTEGRITY AND OVERSIGHT COMMITTEE

Inquiry into the Operation of the *Freedom of Information Act 1982*

Melbourne – Monday 26 February 2024

MEMBERS

Dr Tim Read – Chair
Hon Kim Wells – Deputy Chair
Ryan Batchelor
Jade Benham
Eden Foster
Paul Mercurio
Rachel Payne
Belinda Wilson

WITNESS *(via videoconference)*

Sonia Minutillo, Acting Information Commissioner, Information and Privacy Commission NSW.

The CHAIR: I declare the public hearing for the Integrity and Oversight Committee's Inquiry into the Operation of the *Freedom of Information Act 1982* open. I would like to welcome the public gallery and any members of the public watching the live broadcast. I would also like to acknowledge my colleagues participating today. From my left we have Paul Mercurio; Belinda Wilson; Ryan Batchelor; me, Tim Read; Rachel Payne; Jade Benham; and Eden Foster. Thank you very much.

On behalf of the Integrity and Oversight Committee I acknowledge the First Nations peoples, the traditional owners of this land which has served as a significant meeting place of the First People of Victoria. I acknowledge and pay respect to the elders of First Nations in Victoria past and present and welcome any elders and members of the community who may visit or participate in the public hearing today.

Appearing first, I welcome Sonia Minutillo, Acting Information Commissioner of the Information and Privacy Commission in New South Wales. Commissioner, if you would just pardon me, I have got to go through a couple of statements. Before you give your evidence there are some formal things to cover.

Evidence taken by this committee is generally protected by parliamentary privilege. You are protected against any action for what you say here today, but if you repeat the same things anywhere else, including on social media, these comments will not be protected by this privilege. Any deliberately false evidence or misleading of the Committee may be considered a contempt of Parliament.

All evidence given today is being recorded by Hansard. You will be provided with a proof version of the transcript for you to check once available. Verified transcripts will be placed on the Committee's website. Broadcasting or recording of this hearing by anyone other than Hansard is not permitted.

Once again, I welcome Information Privacy Commissioner Sonia Minutillo from New South Wales. If you have got any brief opening comments, we have got some questions to follow.

Sonia MINUTILLO: Thank you. I do have a brief opening statement, so I might begin with that. Thank you, Chair, Deputy Chair and Committee members, for the opportunity to present to the Committee in respect of its inquiry into the effectiveness of the current legislation to promote right to information in Victoria. I just would like to highlight some of the particular matters raised in our submission as it operates in New South Wales.

Firstly, in New South Wales the *Government Information (Public Access) Act* – the GIPA Act, as it is affectionately referred to – together with the *Government Information (Information Commissioner) Act*, the GIIC Act, set the statutory framework for the right to access information in New South Wales. It operates under a legislative presumption in favour of disclosure of government information. Its remit extends to applying to government agencies, universities, local government, ministers and state-owned corporations. It operates in New South Wales as a push model, with that model achieved by the operation of four access pathways, two of which are proactive and two are reactive.

These are dealt with in our submission, but in summary they are the mandatory proactive release, which is often referred to as open access in New South Wales, in which information is pushed out to the public unless there is an overriding public interest against the disclosure of that information, and that information is available free of charge and on an agency's website; authorised release, which encourages the agencies to proactively release more information that they have in addition to that which is considered to be open access; the informal release pathway, which enables citizens to request information directly of an agency – that provides a faster and cheaper option for both the applicant and the agency; and the fourth and final pathway, which is a large part of the work of the Commission, is the formal access application. That is the pathway which has an application fee attached. It has set statutory time frames, and it has administrative processes associated with dealing with that application. The Information Commissioner is one of the review pathways that is available to a citizen, along with the New South Wales Civil and Administrative Tribunal. The four pathways operate as a virtuous circle. They combine to facilitate the public release of information and they preserve the right of access for citizens to that information. They collectively ensure that government can provide information to the public promptly and

at the lowest reasonable cost. That reflects the objects of the New South Wales legislative regime. It provides for review rights for citizens in relation to the formal pathway, and it provides a vehicle for dealing with agency conduct that might be associated with the other pathways, which is through the *Government Information (Information Commissioner) Act*.

The operation of the four pathways is supported by the work program of the IPC [Information and Privacy Commission NSW], and that is through its review, advice and regulatory functions, along with a work program that involves proactive publication and release of a wide range of resources and guidance to support agencies in the fulfilment of their obligations under the legislation and to enable their capability uplift. Our submission did highlight the existence of a range of resources and materials in terms of national metrics and a jurisdictional compendium, which might be of assistance to the Committee in its deliberations as part of this inquiry. But, additionally, I would comment that digital government and the evolving global issue of artificial intelligence in the provision of government services and the impact that this has are relevant considerations on and for right-to-information legislation. We have highlighted in our submission some of the work that we have done with respect to that, including that there is an upcoming inquiry by the New South Wales Parliament around the issue of artificial intelligence.

I might leave my comments there. I would like to thank the Committee for the opportunity. I hope to be able to address and answer any questions that you may have.

The CHAIR: Thanks very much, Commissioner. We have got a few questions. I might just kick off by asking about what data trends show regarding New South Wales's transition to a second-generation FOI model. I am particularly interested in both changes from when the GIPA Act commenced, comparing before and after, but also what has been happening more recently.

Sonia MINUTILLO: I think in New South Wales one of the aspects of those four pathways is that only one of the four pathways has quite clear, specific data-reporting requirements, and so under the formal pathway we have a lot of data that tells us about the number of applications, the types of decisions that are made and the like. We do not have the same level of data reporting that is available in that same granular level for the other three pathways, but what we have seen over time is a maturing of information that is being released and the pathways and the use of those pathways. We did undertake a piece of work around the informal release pathways, as part of some research to actually interrogate a bit further and look more deeply at how agencies are using that pathway or how they could better use that pathway, as a response to consideration of what we had seen, which was an increase in the volume of formal access applications. What we have been able to identify from that is that the pathway is used, but there are opportunities, I would describe, in enabling agencies to better use the pathway to promote the release of information to citizens.

The CHAIR: Great. Thank you very much. I think Mr Batchelor might have a question.

Ryan BATCHELOR: Thanks, Chair. Thanks, Commissioner, for coming along. Touching on something you just mentioned, I was interested in what the trends are and your reflections on the reasons why, particularly under the formal pathway, access is refused or denied or documents are withheld. What appear to be the trends in how those decisions are made, and what are the main features of that? And then, maybe following on from that, could you go into a bit more detail about what you think could improve the informal pathway – like, why people are not using that informal pathway. Even after you have done your reforms, what are the barriers to access or the reasons that access is being refused in whole or in part?

Sonia MINUTILLO: If I start with the informal release part of your question, I think the research identified for us that understanding of how to use the pathway. It is not to say that the pathway is not used – I want to qualify that; the pathway is in use – but how to better use that pathway and then what opportunities are available to use that pathway and for agencies to be able to have the sort of resources that would enable that decision-making process to occur across the agency so that it was not necessarily just a decision-making process of formal GIPA officers, so to speak, or formal decision-makers, but equipping persons across agencies to be able to respond to requests for information. A customer service person at the front desk of a council who might be asked about some information – being able to equip them to know what kind of information they can release in what circumstances to enable that information. So, we have actually subsequently done a range of work to better enable and equip those agencies more generally to be able to provide information on how to

respond, to create the decisions, to create the processes that enable them to access and use that pathway to provide information.

In terms of the decisions that have been made around the formal pathway, New South Wales has seen, like other jurisdictions have, an increase in the number of access applications. It is the case that the predominant applications in New South Wales appear to be about personal information; that has been the experience that our data tells us. I think it is important to qualify that we do not distinguish in New South Wales in terms of the types of personal information between what might be my own personal information about me that government might hold and the type of information that a government agency might hold but is also the information of another person, which is also personal information. We do not see the distinction between that data, and that might be helpful to understand and may be able to better inform the types of information released that might be able to be better dealt with that is about an individual and their personal information.

For the types of decisions that we have seen in relation to that, the release rates tend to be quite stable, and the release rates tend to be partial release. So, it is not refused in full, but it that might be that part of the information has been released as distinct from the totality of the information. Our data shows that the release rates have actually been quite stable in terms of the amount of information that has been released in response to formal –

Ryan BATCHELOR: Thanks, Chair.

The CHAIR: Thank you. It might just be easier if we start at one end of the table and work down. If Mr Mercurio would like to take the next question, if that is all right.

Paul MERCURIO: Thank you, Commissioner. I was wondering: how has the work of the Information and Privacy Commission changed over time? And how in your experience does the work and workload of the information commissioners in second-generation freedom of information jurisdictions such as New South Wales differ from those in first-generation jurisdictions such as Victoria?

Sonia MINUTILLO: I think it is fair to say that our work has changed. I think in the beginning our work was predominantly responsive to formal access applications exercising that external review function. That has featured as a significant part of our work. I should qualify by saying that continues to be a feature of our work and a significant part of our work. But what has changed in our work program and our work is a shift to a more proactive approach to regulatory functions that sits alongside that statutory function of review work. We have a proactive regulatory regime that sits within our functions, and we use targeted audits as part of that regime to respond to systemic risks that are identified. That is responsive to data that we have collected through our review function or our complaint function that might highlight a trend or an area that perhaps might benefit from some intervention strategies. That allows us to target a theme or a trend issue, allows us to proportionately apply our resources and allows us to be able to provide learnings and opportunities for all agencies rather than a singular individual agency potentially.

Alongside that we also do quite individual, targeted, agency-specific audits from time to time. Over the years we have seen that becoming an increasing part of our program, and we have seen that start to manifest itself by demonstrating in advance the types of thematic audits that we might be doing and publishing those in advance. I think since 2015 we have done about 20 of these types of audits. They are published on our website as reports. They include recommendations for actions that agencies can take. I think what those audits have enabled and what has changed is we have been able to use that audit framework to allow us to deal with some of the other pathways, for example. We have done a number of audits around open access – the proactive mandatory release of information. We have done a number of audits around those things. We have recently completed audits in the local government sector about the additional open access requirements that they have on them. We have done the disclosure logs. We have looked at agency information guides. It allows us to look at those other parts of the legislation that promote information access and be a bit more strategic across the sector in terms of elevating capability and knowledge.

Paul MERCURIO: Okay, thank you.

The CHAIR: Ms Wilson.

Belinda WILSON: Thank you, Chair. How did the privacy and information commission support cultural change across agencies when New South Wales transitioned to a second-generation FOI model? And what might Victoria learn from this in overcoming any barriers to the change?

Sonia MINUTILLO: I think we are essentially talking about cultural change, which needs to be led from the top down and across the organisation. It requires a commitment to and a fostering of an environment where agencies embrace the right to access information, push information out and see the value and the benefit that can be derived from putting information out to citizens and the purpose and the value that that can play in a democratic society. It needs to be in a context of agencies having confidence that they can seek out assistance and that there will be resources and tools available to help them make that transition. We have done a bit of that work, and it is a continuous journey. We have created tools over the years to help agencies self-measure and self-assess themselves against the pathways. We have supplemented those tools with resources that can help them address where they might identify a weakness, and these tools are designed for them to help themselves. But they then form a measure of enabling them to report internally to their senior executives or in terms of their other governing bodies and to put in place the types of frameworks that would allow them to move from where they might be today to where they would like to be. But it does require a cultural commitment and a positive messaging that this is supported, that this is valued and that it makes a difference and is needed.

Belinda WILSON: Thank you.

The CHAIR: Thanks. Commissioner, can you just remind us, how old is the GIPA Act? When was it brought in?

Sonia MINUTILLO: 2009.

The CHAIR: Okay. So, it has been around. Ms Payne.

Rachel PAYNE: Thank you, Chair, and thank you to the Commissioner for speaking with us today. My question is: How did New South Wales determine what kinds of information should or should not be subject to the proactive publication scheme?

Sonia MINUTILLO: The legislation has clearly identified the types of information, and it sets a regime. A suite of that information is common across all entity types, so things like an agency information guide, its policy documents, its disclosure log requirements. These are all policies, processes or features of government operations that are common organisational structural information that should be easily available, that a person should be able to avail themselves of with a degree of ease and simplicity without having to resort to an access application. Supplemented by that is some identification of particular areas of risk in particular sectors that might warrant additional information, so our legislation provides in the local government section, for example, for additional requirements around open access, so that mandatory release, for things like development applications – I am sure you can understand the significance of the decision-making around development applications – but also equally things like declarations around pecuniary interests, conflicts of interest and the like for councillors and designated persons. It is around some analysis of what are the risks that might be particular to an area or an industry sector that is covered by the legislation that might warrant a more specific remediation and response through open access or that could be done through open access.

The CHAIR: Thanks. Shall we go to Ms Benham?

Jade BENHAM: Thank you, Chair. We have already touched on this a little bit, but can you go into a little more detail on the kinds of issues the Information and Privacy Commission encounter[s] regarding the proactive and informal release?

Sonia MINUTILLO: This is a slight generalisation, because they are different parts of our legislated sectors. It is different in terms of the level of maturity and the types of issues. But I think it is understanding why these pathways are there, the value that these pathways can provide, how they might enable you to provide information that then might not result in formal access applications being made and what does 'good' look like in terms of practice, being able to draw upon models of good practice and experience from within the sectors where it is being done well or it is being done better potentially that allows a smaller entity or a smaller agency to look to that to help them achieve it, because I think for us in New South Wales there is a recognition that every agency is different in its size and its resourcing and its capabilities, and in some their maturity is far more

developed than others. Then for us it has been about what are the resources and the tools with which we can help enable them to do that, so there is a lot of published material that we develop in terms of fact sheets, guidance, self-assessment tools. We engage with our practitioners regularly so that we can actually provide material that is responsive to those needs. But I think there is a recognition that agencies are different in their size and in their capacity and how you seek to achieve provision of support for different types.

Jade BENHAM: Thank you.

The CHAIR: All right. We will go to Ms Foster.

Eden FOSTER: Thank you, Chair. Thank you, Commissioner. In your introduction you mentioned AI [artificial intelligence]. What can Victoria take away from the findings and recommendations of the Information and Privacy Commission's 2022 scan of the AI regulatory landscape?

Sonia MINUTILLO: I think there are lots of things, but the couple that I would draw out go to the issue of service delivery, the use of contractors, either where they are the providers of the technology or they are delivering services on behalf of government through that technology, and the ability for access to that information so that government can respond to a citizen who might want to understand how a particular piece of technology has been deployed and what does it mean in the exercise of that technology and their rights to a government system, a process or a right. I think the ability to audit those logs and some visibility over the training data and the data that is used to inform how the technology is going to be used, I think there is a need to be addressing the intellectual property rights – who owns what in the use of the technology – and I think retention of Human-in-the-Loop, in the decision-making process, having some capacity to require currency explainability and transparency of how the AI function is working and will work. Even something as simple as making it known that the AI is in play – that it is being used and how it is being used – and then being able to address the right to access to information if the technology is at play and is being used as an input to make a decision that might impact someone's rights in New South Wales. This arose around an issue around housing subsidies, for example – the ability to access the information about how the decision was made about whether or not the housing subsidy should or should not be paid. So, they are some of the things that I think go to the heart of the use of AI. Look, we have got an inquiry; there will be further lessons that will come out of that for everyone.

The CHAIR: Thank you very much. Now, just looking at the time, I might skip ahead a little in our questions. I would just like to ask, Commissioner: Are there limitations in the New South Wales GIPA Act regarding alternative statutory release schemes, for example, for health records or care leaver records?

Sonia MINUTILLO: No. I think what is worth bringing to the Committee's attention is that in New South Wales there is separate legislation that exists, the health records and information legislation, which allows you to make a request for access to your health information. That pathway has no cost. It has no time limit attached to it. The GIPA Act also allows you a pathway to access that information, and I suppose it is not so much a limitation – I think you need to have some clarity about how those two pathways operate alongside each other, and there are distinct differences. One has a fee attached, one does not. One has a set time frame. Even the review pathways – how they come to exist is different. So, I think perhaps not so much there are not limitations in the GIPA act: you can make a request under the GIPA Act for access to information as long as it is held in a record. It is not categorised by the type of information or a class of information, but I think there needs to be real clarity of how those two legislative schemes operate alongside each other and how they intersect so that for a citizen there is an ease and clarity of understanding about how they can get access to the information in the most straightforward way.

The CHAIR: Great, thank you. If I can just ask briefly: have you had feedback from agencies on the effectiveness of the GIPA Act's vexatious applicant provisions?

Sonia MINUTILLO: We engage with agencies around repeat frequent applicants. The Information Commissioner herself does not have a power. The power in New South Wales is a discretionary power that sits with the tribunal that is enlivened on application and set in certain types of circumstances. The tribunal has over the years issued orders that have restricted – effectively it creates a restraint order limiting an ability for the application to be made. If a restraint order has been issued, it requires then the applicant who might wish to make an application to do so only after having given notice to the agency and the Information Commissioner. It

is an area that is a discretionary power, and it is one that needs to be considered I guess really carefully in the sense that it is a vetoing of a person's rights to access. That is why, whilst it is there, there is a procedural process that creates procedural fairness in the exercise of a decision to restrain someone.

The CHAIR: Thank you. I think Mr Batchelor has got a question.

Ryan BATCHELOR: Thanks. Commissioner, your submission referred to a particular case about social housing rental calculations. I have not read the case, but reading the summary it seemed like there were some challenges in your system about individuals accessing information held by contracted third parties. Is that the nub of the problem here?

Sonia MINUTILLO: Yes, that is right. Correct.

Ryan BATCHELOR: Could you just expand on that a little bit and talk a little bit about some of the challenges you have experienced with non-government agencies exercising effectively government functions – holding information – and how we should work through those issues in our review.

Sonia MINUTILLO: Certainly. New South Wales has a provision that is referred to as section 121, which actually addresses this delivery of government services on behalf of government by external providers – so not-for-profits – and it creates a right of immediate access to certain information. It is not everything – certain information is not included – but it does create a right of access. In that housing matter, there was a service provider delivering essentially an algorithm for the calculation, so the issue was really about getting access to the information that would inform that. So, these are the observations I made around AI: it is about the right of access. If you are engaging provisions of technology and the like where decisions may be made that affect a person's rights, the ability for a person to be able to query that, to challenge that, to be satisfied that it is operating as it should, needs to be built in. So, we have these provisions around section 121. They do arise but not as frequently as they perhaps could in terms of access to information.

Ryan BATCHELOR: To clarify, you have got the legislative provision that allows the right to access the information, but the problem was that effectively the algorithm that was being used to make the decision was not capable of being understood or conveyed. Is that right?

Sonia MINUTILLO: It was not accessible.

Ryan BATCHELOR: It was not accessible. Interesting.

The CHAIR: Do other Committee members have questions?

Paul MERCURIO: Yes.

The CHAIR: Mr Mercurio.

Paul MERCURIO: I think you sort of answered it, but I was just going back to when you were talking about AI. I wondered if what you were saying was that you were using AI to make decisions about freedom-of-information requests. Would that be accurate? But, also, what you were talking about, Ryan – they have used AI to come up with an algorithm.

Sonia MINUTILLO: I am referring more in relation to the use of AI to make government decisions or to exercise government functions, as distinct from the use of AI for FOI purposes or freedom-of-information access. So, it is in the service delivery.

Paul MERCURIO: Okay.

The CHAIR: All right. One last one from me: Commissioner, are there any drawbacks, disadvantages or unwanted effects experienced from shifting from a first-generation system to the GIPA Act?

Sonia MINUTILLO: I guess in terms of drawbacks, if we had the benefit of more data around the operation of those other three pathways, I think that that would provide us with more opportunities on how we might better enable those pathways – how we might be able to support agencies to build their capability. I think that is, in a general sense, perhaps one of the drawbacks, in that the data that we have is narrow. It is only what

comes to us either through reviews or complaints or through our experience, as distinct from what we have in the formal pathway, where there are these reporting requirements that provide quite a level of intimate detail about the operation of the formal pathway.

The CHAIR: Great, thank you. Further questions from any Committee members? Otherwise, what we might do is take a break from the broadcast here and resume the broadcast at about 5 past 2. Thank you very much, Commissioner, for appearing.

Witness withdrew.