



public interest
ADVOCACY CENTRE LTD

**Getting the balance right: Response to the NSW
Law Reform Commission's *Privacy and Access to
Personal Information: Points for Discussion***

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's expertise in privacy law

PIAC has a long history of interest in, and concern about, the appropriate protection of privacy rights in both the public and private sectors. PIAC has been a strong advocate for the protection of the privacy rights of Australians, particularly the rights of individual Australians to control their personal information and to be free of excessive intrusions. PIAC's work as a consumer advocacy organisation, particularly in relation to health matters, has required PIAC to consider privacy issues because they are frequently a matter of concern to many people who contact PIAC, particularly in relation to health matters.

In recent years, PIAC has provided legal advice and assistance to clients in a number of matters involving alleged breaches of the *Privacy and Personal Information Protection Act 1998* (NSW) (the PPIP Act) and the *Privacy Act 1988* (Cth) (the Privacy Act). In 2006, PIAC represented the respondent in *Director General, NSW Department of Education and Training v MT* [2006] NSWCA 270, a landmark case concerning the interpretation of several key provisions of the PPIP Act. In another matter, currently before the Office of the Privacy Commissioner (OPC), PIAC is representing a former Villawood detainee whose personal information was inappropriately disclosed to the media.

PIAC has played a leading role in privacy debates in Australia in recent years, contributing to a number of inquiries and reviews at the national and state level. Recent submissions by PIAC have addressed the privacy

implications of the proposed Health and Social Services Access Card¹, and the proposal by the Australian Bureau of Statistics to implement a longitudinal study in the population census (a proposal requiring capacity to data match over time).² In October 2007, PIAC made a submission to the first Consultation Paper in the current reference from the New South Wales Law Reform Commission (NSW LRC), *Consultation Paper 1 – Invasion of Privacy*.³ In December 2007, PIAC made a submission in response to *DP72: Review of Australian Privacy Law*, as part of the reference on privacy being conducted by the Australian Law Reform Commission (ALRC).⁴ PIAC also made submissions to:

- the NSW LRC's Consultation Paper 3: Privacy Legislation in New South Wales⁵;
- the Department of Prime Minister and Cabinet in relation to the draft Unified Privacy Principles.⁶

PIAC has also recently written to the Federal Department of Health and Ageing raising privacy concerns in relation to proposals on e-health and healthcare identifiers.

PIAC Chief Executive Officer, Robin Banks, is a member of the Privacy Advisory Committee (PAC), which provides strategic advice to the Federal Privacy Commissioner on privacy issues and the protection of personal information.

PIAC's expertise in access to information held by government

For over fifteen years PIAC has also utilised freedom of information legislation on behalf of clients. PIAC has undertaken a number of test cases under freedom of information legislation including *Searle Pty Ltd v PIAC* (1992) 102 ALR 163 and *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588.

PIAC has also contributed to debate about freedom of information (FOI) legislation, including making submissions to the Australian Law Reform Commission inquiry into the *Freedom of Information Act 1982* (Cth) (FOI Act) in March and July 1995. More recently, PIAC has made a submission to the NSW Ombudsman in response to his discussion paper on the FOI Act⁷ and to the NSW Government in response to its draft Open Government Information legislative package.⁸

¹ Public Interest Advocacy Centre, *Health and Social Services Access Card: Submission to Access Card Consumer and Privacy Taskforce, Discussion Paper* (2006); Public Interest Advocacy Centre, *Access Card Proposal Still Fails Public Interest Test: Comment on the Exposure Drafts of the Access Card Legislation* (2007).

² Public Interest Advocacy Centre, *Submission to the Australian Bureau of Statistics on Enhancing the Population Census: Developing a Longitudinal View* (2005).

³ Public Interest Advocacy Centre, *Matching Rights with Remedies: a statutory cause of action for invasion of privacy, Submission to the NSW Law Reform Commission on Consultation Paper 1 – Invasion of Privacy* (2007).

⁴ Anne Mainsbridge with Robin Banks, *Resurrecting the right to privacy: Response to Australian Law Reform Commission Discussion Paper 72: Review of Australian Privacy Law* (2007) Public Interest Advocacy Centre <<http://www.piac.asn.au/publications/pubs/07.12.21-PIAC%20Sub%20to%20DP72.pdf>> at 24 August 2009.

⁵ Public Interest Advocacy Centre, *Improving Clarity and enhancing protection of privacy rights: Response to the NSW Law Reform Commission's Consultation Paper 3: Privacy Legislation in NSW* (2008) <<http://www.piac.asn.au/publications/pubs/08.12.24-PIAC-NSWPrivacy.pdf>> at 24 August 2009.

⁶ Robin Banks, *Unified Privacy Principles – the Right Way Ahead: comments to the Federal Department of Prime Minister and Cabinet on the draft UPPs* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2009020_20090202.html> at 25 August 2009.

⁷ Lizzie Simpson with Ee-von Lok and Claire O'Moore, *Freeing up information: response to the NSW Ombudsman's Review of Freedom of Information Law in NSW* (2008) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2008111_20081117.html> at 25 August 2009.

⁸ Lizzie Simpson, *Improving government accountability through Information Access: Submission in response to the NSW Government's public consultation draft, Open Government Information legislative package* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2009060_20090605.html> at 26 August 2009.

PIAC has also made a submission to the Commonwealth Government in response to its exposure draft Bills to reform the *Freedom of Information Act 1982* (Cth).⁹

NSW LRC's inquiry into access to personal information

PIAC welcomes the opportunity to make a submission to the NSW LRC on the handling of access applications for personal information of persons, other than the applicant, under the FOI Act. This review is particularly timely, given the NSW Government's recent reforms to the freedom of information (FOI) regime. PIAC hopes that this review will inform those changes and any future government policies that govern the handling of applications for information about personal information and the interrelationship between freedom of information and privacy legislation in NSW.

⁹ Lizzie Simpson, *Putting Public Interest at the heart of FOI: Submission in response to the Commonwealth Government's exposure draft of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009* (2009) Public Interest Advocacy Centre
<http://www.piac.asn.au/publications/pubs/SUB2009051_20090519.html> at 26 August 2009.

Responses to the issues identified

Issue 1: How do agencies determine that a document contains information concerning a person's personal affairs, and what steps do and should they take to contact and consult with third parties?

PIAC submits that there are a number of factors that should be considered when determining what steps an agency should take to contact and consult with third parties.

Firstly, in PIAC's experience, if there is any reference (no matter how small) to personal information, agencies currently assume that they must obtain a third party's permission for release of the information, and conversely, assume they cannot disclose the information if they do not obtain the third party's permission to do so. Too often, agencies fail to consider, as part of this process, whether the document could be redacted or de-identified to enable it to be released without interfering with the privacy of a third party.

In this respect, agencies should distinguish between requests that are squarely concerned with obtaining personal information about a third party from those (more common) requests for government information, which may contain only a small amount of personal information about a third party, such as information about a department's policy that includes the name and position of the head of the department. PIAC contends that in respect of requests that fall into the latter category, it should be possible to redact or otherwise amend this information so it is possible to disclose it, without necessarily disclosing the personal information of a third party (although, in the example given above, in PIAC's view there would be no need to remove the detail of the name and position of the head of the department as this is not personal information that should be protected from disclosure). In relation to the former category of requests, PIAC maintains that consideration should be given to whether it is possible to amend the information in such a way that it can still be released without breaching the third party's privacy, although PIAC acknowledges that it may be difficult. In those cases where it is not possible, agencies should have to take all practicable steps to contact the third party about the request, in order to seek their views on disclosure.

Second, PIAC submits that the nature of the personal information should be taken into account in determining the appropriate steps that agencies should take in consulting with third parties. PIAC is of the view that stricter controls should be adopted in order to guard against disclosure of 'sensitive personal information'¹⁰ about third parties.

Issue 2: How, in practice, do agencies balance the interests of members of the public in being given access to government documents against the interest in protecting the privacy of third parties? In particular, what factors do agencies take into account?

As noted above, in PIAC's experience where agencies are not able to obtain a third party's consent, there is a tendency for the agency to treat this as yet another reason not to disclose the documents. However, PIAC does not accept that a third party's refusal should act as a veto, stopping agencies from releasing documents to the public.

A related issue is the fact that agencies do not currently have adequate guidance as to how they should carry out the exercise of balancing different public interest considerations. Of particular relevance to the current

¹⁰ *Privacy and Personal Information Protection Act 1998* (NSW) sub-s 19(1).

inquiry would be guidance on balancing the public interest in disclosing a document and the public interest in protecting an individual's privacy when determining whether or not a document should be disclosed in response to an FOI request.

PIAC acknowledges that there is already guidance in NSW that sets out some public interest factors that a decision-maker should take into account when responding to an FOI request.¹¹ PIAC submits, however, that this guidance is completely inadequate, particularly when for example, it is compared against the comprehensive list of factors for and against disclosure contained in the Queensland FOI Independent Review Panel's report, *The Right to Information – Reviewing Queensland's FOI Act*.¹²

Furthermore, the existing guidance¹³ fails to deal with the fact that when deciding where the public interest lies, it is not possible to simply draw up a list and add up the number of reasons for or against disclosure. Rather, a decision-maker should have to consider what the different interests at play are in a particular case, whose interests are affected, and the relative weights of the different interests. PIAC is not aware of any NSW guidance that adequately sets out the relative time/weighting considerations that should form part of this public interest assessment.

Issue 3: Does clause 6 of Schedule 1 provide adequate protection for the privacy of third parties?

PIAC submits that this clause should be amended by removing the reference to the personal affairs of deceased persons on the basis that the fundamental human right to privacy does not survive death.

Issue 4: What policies do agencies have in relation to access applications for personal information of persons other than the applicant?

No comment.

Issue 5: To what extent are FOI decision-makers aware of PPIPA, in particular the disclosure provisions in section 18 and 19? Do FOI decision-makers take these provisions into account in deciding whether to give access to a document? Should they do so?

In relation to the issue of consistency between the FOI Act (or any successor legislation) and PPIP Act, PIAC is of the view that the phrase 'personal affairs' in the FOI Act should be replaced with the phrase 'personal information'.

Furthermore, as noted above, PIAC contends that when considering whether or not to release 'sensitive personal information', special restrictions should be applied and this information should only be released in very limited circumstances. In defining what is 'sensitive personal information', and determining when it should be released in response to an FOI request, decision-makers should refer to section 19 of the PPIP Act.

On the other hand, PIAC contends that section 18 of the PPIP Act is less likely to be relevant to a decision about whether or not to release a document in response to an FOI request. For example, PIAC considers that it is

¹¹ See, for eg, NSW Department of Premier & Cabinet and NSW Ombudsman, *The NSW FOI Manual* (2007) <http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0019/685/FOIManual15Aug07.pdf> at 18 August 2009.

¹² FOI Independent Review Panel, *The Right to Information – Reviewing Queensland's FOI Act* (2008) <http://www.foireview.qld.gov.au/documents_for_download/FOI-review-report-10062008.pdf> at 18 August 2009, 152-154, 163-164.

¹³ See, for eg, NSW Department of Premier & Cabinet and NSW Ombudsman, above n11.

extremely unlikely that it could ever be said that disclosure of a document in response to an FOI request was 'directly related' to the purpose for which the information was collected. Similarly, PIAC cannot think of an example when it could be said that a third party would have been reasonably likely to have been aware that this information was 'usually disclosed' in response to an FOI request.

Issue 6: What problems arise in practice from overlapping provisions concerning disclosure, access and amendment under the different Acts?

PIAC approaches this issue by focusing on the objectives of the different Acts. The objective of the PPIP Act is to protect an individual's right to privacy, and the PPIP Act is only concerned with government accountability in the sense that it ensures the integrity of personal information held by government agencies. In contrast, the FOI Act is intended to ensure government accountability by allowing citizens access to government information.

Therefore, in PIAC's view, the most fundamental problem that arises from the overlapping provisions is that, at times, applications are dealt with under the wrong regime. PIAC maintains that access to, and amendment of, one's own personal information should be dealt with under the PPIP Act, and that requests for all other information, including personal information about a third party, should be dealt with under the FOI Act.

Issue 7: How will the new provisions of GIPA be applied? Will they provide greater or less protection for privacy in NSW?

PIAC submits that the test contained in paragraph 54(1)(b) of the *Government Information (Public Access) Act 2009* (NSW) (GIP Act) namely that the person may 'reasonably be expected to have concerns about the disclosure' is too vague and uncertain. Subject to the comments noted above about how the test should be applied, PIAC prefers the existing test contained in section 31 of the FOI Act, that a decision-maker must take such steps as are reasonably practicable to obtain the views of the person 'concerned'.

Issue 8: Do FOI decision-makers consider any additional or different factors where the access applicant seeks personal information about public officials? Should they?

Whether or not an FOI decision-maker should consider different factors when the access applicant seeks personal information about public officials depends on the type of information sought. For example, if the information is about the official in his/her capacity as a public official, then PIAC contends that there should be a strong presumption that the public interest will favour the release of that information.

Whereas, if the information is about the official in his/her private capacity, then the same factors should apply as would be applied to government information about any other individual, unless the information is relevant to the official's discharge of his/her public functions. So, for example, if the information discloses that a planning official has a pecuniary interest in a development application that the official permitted to go ahead, there is likely to be a strong public interest in favour of releasing the information.

Conclusion

As noted above, PIAC is strongly of the view that it would be more consistent with the respective objects of the two regimes—privacy and freedom of information—for access to, and amendment of, one's own personal information to be dealt with under the PPIP Act, and for requests for all other information, including personal information about a third party, to be dealt with under the FOI Act.