

Our ref: EErgCrim:1648215

7 March 2019

Commissioner Peter Severin  
Corrective Services NSW  
Department of Justice  
GPO Box 31  
Sydney NSW 2001

Dear Commissioner,

**Applications under the *Government Information Public Access Act 2009***

The Law Society is concerned about what appears to be a recent policy change on the part of Corrective Services NSW when dealing with applications under the *Government Information Public Access Act 2009* ("GIPA").

Legal practitioners have reported that GIPA requests for clients' personal information such as case notes have been refused on the grounds that they could instead be obtained via subpoena in court proceedings.

Where an accused person has been in custody on remand, they may wish to make a GIPA application for their custodial case notes that may contain details of courses and programs attended as well as behavioural and welfare issues. If relevant, these case notes may be tendered by the accused's legal representative in sentence proceedings.

It is now apparently being suggested by the Information Access Unit that it is more appropriate to seek access to these documents via a subpoena, and accordingly the GIPA application is refused.

We believe this apparent change in policy has arisen from recent amendments to the GIPA. The *Government Information (Public Access) Amendment Act 2018* commenced on 28 November 2018, inserting new paragraph (e) to section 60(1) of the GIPA. In addition to the reasons set out in paragraphs (a) to (d), an agency may refuse to deal with an access application if:

- (e) the agency reasonably believes the applicant, or a person acting in concert with the applicant, is:
  - (i) a party to current proceedings before a court, and
  - (ii) able to apply to that court for the information.

The use of the word "may" in section 60 makes it clear that the decision to refuse an application is discretionary. We note that section 5 provides a presumption in favour of the release of government information.

We suggest that declining a GIPA application under these circumstances was intended to be the exception rather than the rule. In the Second Reading Speech the Attorney General said

in relation to the purpose of the new paragraph (e): "This prevents the possibility of using the GIPA Act to circumvent the jurisdiction of the court to control its own processes".<sup>1</sup>

An example of where it may be appropriate to decline such an application is where the information sought is not the applicant's personal information and where the material may be subject to a claim of privilege, or public interest immunity might be made out if the information was sought via the court. Another example is where an offender seeks access to a copy of a Sentencing Assessment Report that was prepared by Community Corrections for the offender's sentence proceedings. Such reports are prepared for the court and would generally be kept on the court file. Under such circumstances it would be relatively easy to obtain this document from the court rather than applying to Corrective Services NSW under the GIPA.

However, in relation to material that is not already part of a court file, such as case notes or other personal information held by Corrective Services NSW, it is unreasonable to expect the applicant to instead seek these documents by subpoena. Not only is it personal information to which the applicant has a right under the GIPA, but much of this information may be confidential. Once material is produced on subpoena, it becomes available to all parties in the case and confidentiality would therefore be lost. In our view it is unreasonable to require inmates or offenders to seek access to their personal information in this way.

We would be grateful if you could clarify the current policy of Corrective Services NSW in relation to GIPA applications in such circumstances. If it is not departmental policy to routinely refuse such applications in criminal matters, we suggest that some guidelines and education be provided to staff to minimise the likelihood that GIPA requests will be inappropriately refused in future.

We look forward to hearing from you at your earliest convenience.

The contact person for this matter is Ms Rachel Geare, Senior Policy Lawyer, who is available on (02) 9926 0310 or at [rachel.geare@lawsociety.com.au](mailto:rachel.geare@lawsociety.com.au).

Yours sincerely,



Elizabeth Espinosa  
**President**

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<sup>1</sup> *Government Information (Public Access) Amendment Bill 2018*, Second Reading Speech, 24 October 2018.