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**Submission on the review of the Government Information (Public Access) Act 2009 (GIPA Act)**

Hornsby Council provides the following submission in relation to the review of the GIPA Act.

**Conflict Between the Privacy and Personal Information Protection Act (PPIPA) and the GIPA Act**

Continually balancing the requirements of both the PPIPA and GIPA Acts is a constant source of frustration and angst, as well as a considerable drain on resources, for local Councils.

It is suggested that the review consider the interaction of the above two Acts and attempt to resolve the conflict they present for agencies in dealing with requests for information. PPIPA promotes the protection of personal information and only using information for the purpose for which it was collected, whereas GIPA promotes the accessibility of all government information to the public with little regard to the intended use of that information.

Much of this confusion is in relation to information about development applications (DAs). Specific examples of difficulties encountered include:

- The Environmental Planning and Assessment Act (EP&A) Act requires certain information about DAs, such as the applicant and the address of the DA, to be publicly available. GIPA requires that DAs and *any associated documents* be made available on websites (as they are prescribed under the GIPA Act as being open access information). Much of that associated information contains personal information which, according to PPIPA, should not be publicly available.

- In an attempt to give some clarification on this conflict, in May 2011 the IPC issued a Knowledge Update and Guidelines in respect of personal information contained in DAs and their display on the website, which advised, in summary that any personal information contained in DAs should be redacted before the DA is displayed on the website. This has added considerably to the administrative burden on Councils. In particular, in respect of certain associated information such as submissions in respect of a DA, this nearly always includes personal information which should not be displayed on the website. Many local councils however, simply do not have the resources to redact names, address, phone numbers, email addresses etc from the thousands of submissions that are received.

- Even the summary DA information (address of DA and name of applicant) includes personal information where the applicant is often the owner and resides at the DA address. This information is required by the EP&A Act to be publicly available, and by GIPA to be on the website, but according to the GIPA Guidelines, should not be on the website. In addition, this information is often contained in a report to council about the DA, and again in accordance with GIPA, council reports are to be made available on councils' websites. If councils were to remove this summary information, say the name of the applicant, from the report so that it didn't appear on the website, how would Councillors be informed of the information about this DA in order to enable them to comply with their duty to declare a pecuniary or non pecuniary interest in a matter before Council?

- Despite the abovementioned advice and Guidelines being issued to councils about what information relating to DAs should be included on their websites, there still appears to be some confusion and inconsistent approaches taken by different councils, and even a complete departure from that advice by various other agencies. For example, it is noted that the State Department of Planning appears to display all information relating to DAs, including names, addresses, signatures, and contact details contained in submissions etc on its website. The Department does include a statement on their website about a person's ability to not have this information displayed – see below extract:

  **(a) When you make a submission we will publish:**

  - ***the content of your submission and any attachments*** - including any personal information about you which you have chosen to include in those documents
  - ***a list of submitters,*** which will include:
    - your name (unless you request your name be withheld from the list by ticking the relevant box below)
    - your suburb or town
  - ***any political donations disclosure statement,*** in accordance with the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.

  However, local councils have been advised that such an approach is not in accordance with the requirements of the GIPA Act. It is inequitable that local councils must adhere strictly to the Guidelines issued by the IPC but other agencies are apparently permitted to take a different approach. This creates inconsistency and confusion amongst government agencies as well as members of the public and does little to promote the virtues and sensibilities of the GIPA. This matter has been raised several times with the IPC who have expressed an intent to investigate the issue, but to my knowledge it has not been further addressed.

A further example of the difficult interplay between the Acts which does not relate to DAs include:

- Where an opinion about an individual is expressed and contained within a document held by, but not authored by, Council, is the information personal to the person who expressed it, or the person to whom it is about?
- Section 14 of the PPIPA Act states that a public sector agency that holds personal information must, at the request of the individual to whom the information relates and without excessive delay or expense, provide the individual with access to the information.

- Section 12 (2) (d) of the GIPA Act states:

  ***Note.*** *The following are examples of public interest considerations in favour of disclosure of information:*

  *. . .*

  *(d) The information is personal information of the person to whom it is to be disclosed.*

  Does the person who noted this opinion also have the right for this information to be withheld because it is their personal opinion? Clarification of this part of the Act is required.

It may also be worthwhile considering whether the GIPA and PPIPA Acts can be combined by the Government into one Act such that those who have to comply with two sets of legislation currently, are able to more easily balance the competing principles of openness and accountability and the protection of privacy.

**Open Access Information**

NSW councils are required to provide their Open Access Information (Schedule 1 of the Regulation) free of charge to members of the public and this includes all information regarding Development Applications whenever they have been created. This requirement causes a large financial burden to councils particularly in relation to Development Applications. Some councils have records dating back 100 years and the Act places no restrictions on the number of requests a person may make or a limit on the volume of files any one person can request. The unreasonable diversion of resources clause in the Act [s53(5)] only relates to Access Applications and there is no provision in the Act to deal with unreasonable and repeated requests for Open Access Information. The financial burden for councils in dealing with these requests is enormous as most of the Development Application Files councils have are stored in off-site storage facilities and Council must pay retrieval costs to request files as well as organise for the files to be sent back to the off-site storage once the files have been viewed. It should be noted that most of these files are in hard copy and the cost involved in scanning all these files is unfeasible and it is very rare to receive multiple requests for the same Development Application at the same time, making economies of scale difficult.

As there is no limit on the number of requests a member of the public can make one council has an example of a member of the public requesting the same Development Application files 17 times within a 12 month period.

The review may consider:-

(a) Including a provision in the Act for unreasonable diversion of resources in relation to requests under the Act for Open Access Information;
(b) Limits on the number of requests a person can make in a year for the same Open Access Information;
(c) The ability to charge if a person requests the same information on multiple occasions; and

(d) Reviewing the words in Schedule 1 Part 3 of the Regulation that relate to Development Applications so there is a limit on the accessibility of Development Applications available free of charge e.g. the current version of a Development Application for a property could be free of charge and previous versions available at a cost.

Another suggestion would be to limit the time scale on open access i.e. a 10 year limit in the nature of "open access" which ties in with disposal schedules for normal residential DA's. Hornsby Council's 10 year old DA's will soon all be available on its website. If a request is received for a file held in the offsite archive a charge equivalent to the formal application fee could apply.

**Fees under the Act**

The $30 Application and Processing fees were introduced in 1989 under the previous Freedom of Information Act. There has been no increase in this statutory fee since 1989. Given, the increased financial burden of storage and retrieval costs outlined above it is recommended that these fees be increased and provision be included in the Act for agencies to make annual increases of these fees in line with CPI.

**Copyright**

Section 6(1) of the Act requires councils to make its Open Access Information publicly available and Section 6(2) states that it should be available on a website maintained by the agency, however some of the documents this applies to are copyright documents such as plans, drawings, statements etc. and there is no protection for councils in providing copies of these documents as required under GIPA.

Section 6(6) of the Act states "Nothing in this section or the regulations requires or permits an agency to make open access information available in any way that would constitute an infringement of copyright".

Many councils interpret Section 6(6) to mean that they do not need to provide any documents which are copyright. Given a significant amount of copyright documents are submitted in respect to Development Applications this goes against the objects of the Act in providing greater openness and transparency of government information.

Other councils deal with this issue in varying ways, with some providing the copyrighted information with the inclusion of a disclaimer, advising that the information has been provided in accordance with the GIPA Act and that copyright provisions still apply to the information. Whilst this approach has worked well for some councils with no adverse impacts, it appears to be not strictly in accordance with relevant legislation, and is increasingly difficult to include this when many or most information is provided to applicants electronically.

Once again, there is much inconsistency amongst local councils about how this issue is managed. A uniform approach by all NSW government agencies should be the desired outcome.

The Australian Law Review Commission produced a report in November 2013 that was tabled in Federal Parliament on Copyright and the Digital Economy. The report recommends (pg330) that local government be given an exemption to Copyright where a statute requires public access. It is therefore suggested that the Department of Justice make representations to the Australian Government to request that the Copyright Act be amended to include recommendation 15.3 (shown below) of the Australian Law Review Commission report on Copyright and the Digital Economy dated November 2013, in order to resolve the copyright issues currently being experienced by local government.

*"15.3 The ALRC recommends that the current exceptions for parliamentary libraries and judicial proceedings should be retained, and that further exceptions should be enacted. These exceptions should apply to use for public inquiries and tribunal proceedings, uses where a statute requires public access, and use of material sent to governments in the course of public business. Governments should also be able to rely on all of the other exceptions in the Copyright Act. These exceptions should be available to Commonwealth, state and local governments".*

**Determination Letters of Formal Applications**

It is considered that there would be benefit in streamlining the formal application process so that it is not as heavily bureaucratic. The templates provided by the IPC and the information required to be included in a formal application are overly complex, particularly if the information is to be released. For example, why is it necessary to include a written account of such extensive public interest considerations for and against disclosure in the determination letter, if the information is to be provided? The applicant is not interested in the reasons taken into account *not* to release the information, if they are to get the information anyway. .It is understood and agreed that there does need to be some record of the process and thoughts an agency has gone through in order to arrive at their determination, but the amount of detail currently required to be documented is onerous and unnecessary.

**Seeking Payment When No Information is to be Provided**

In some cases, much time is expended by staff in searching for information requested in a formal application, incurring chargeable costs over and above the application fee of $30. When information is to be provided it is usual to advise the application that the request has been determined, certain information has been identified and will be provided upon payment of any associated additional fees. However, it seems ridiculous to provide a determination letter advising that no information has been located, but that the needs to pay an additional $60 for the time spent searching for it. Obviously the success in receiving the additional payment in such cases is extremely limited. It would seem equally ridiculous to advise that the application is complete and once outstanding fees have been paid, the determination will be provided to the applicant, when the determination letter will simply advise that no information was located. This appears to be a gap where one of the already limited opportunities for agencies to retrieve some small cost recovery is completely unviable.

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The above may include more detail than perhaps was intended by the call for submissions for review of the GIPA Act, however it is felt that such detail and examples are necessary to provide a full understanding of

why there is a call for change to certain parts of the Act by practitioners. This is often not fully appreciated at a higher level or where broader requests are made.

I thank you for the opportunity to contribute to the Review and appreciate your consideration of the issues highlighted herein.

If you would like to discuss any of the above, please do not hesitate to contact me on 9847-6608.

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