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COUNCIL

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26 August 2014

The Director, Justice Policy
Department of Justice
GPO Box 6
SYDNEY NSW 2001

Dear Sir/Madam

Re: Review of the *Government Information (Public Access) Act 2009* (GIPA Act)

Council makes the following submission to the review of the *Government Information (Public Access) Act 2009* (the Act) being conducted by the NSW Attorney General.

It is understood that the review is to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing these objectives. The object of the Act (as detailed under section 3) is to maintain and advance a system of responsible and representative democratic government that is open, accountable, fair and effective by:

a. authorising and encouraging the proactive public release of government information by agencies
b. giving members of the public an enforceable right to access government information
c. providing that access to government information is restricted only when there is an overriding public interest against disclosure

1. Exemption of personnel and recruitment information

Council has identified that there is an expectation by applicants that they are able to seek access to personnel and recruitment information for staff. Council has dealt with access applications from staff and ex-staff for the personnel and recruitment information that is not their personal information nor related to their own position with Council. Council has dealt with these applications by considering the public interest considerations for and against disclosure and applying the public interest test to determine that the information will not be disclosed, the reasons for refusal generally being:

- it is conclusively presumed that there is an overriding public interest against disclosure of the government information described under 'reasonable and effective government' in the Table to section 14
- the Office of the Information Commissioner Guideline 4 on Personal Information as a Public Interest Consideration under the Act defines common examples of personal information many of which are detailed in resumes and job applications
- disclosure would contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* (the PPIP Act)

Council's decisions have then been subjected to internal review, review by the Information and Privacy Commission (IPC) and applications to the NSW Civil and Administrative Tribunal (NCAT). Council's position is that it will never release such information and the need to defend such action under the current provisions of the Act, amounts to an administrative and financial burden on Council, the resources needed for which could be better used in reviewing and improving Council's access to information systems for the majority.

There is also concern that consulting with the persons to whom the personal information refers causes unnecessary anguish that their personal information may be released to some unknown person, not to mention the additional cost and time in undertaking this consultation process.

It is Council's view that any personnel information of staff that is not the personal information of an applicant should be information for which it is conclusively presumed that there is an overriding public interest against disclosure. This may necessitate the Table to section 14 of the Act being amended to include personnel information (other than an applicant's own information).

2. Information Commissioner's Guidelines

The Act provides that the Information Commissioner can issue certain guidelines for the assistance of agencies and at section 15 requires agencies to have regard to any relevant guidelines issued by the Information Commissioner. Following review by the IPC, Council has been subject to criticism for notices of decisions not addressing considerations raised in IPC guidelines. The level of information required by the Act concerning an agency's consideration contained in notices of decisions may be inconsistent with that required by the IPC guidelines.

The Act should either provide that agencies 'have regard to' or 'comply with' guidelines to eliminate uncertainty. It is suggested that 'have regard to' should remain with the clarification that IPC guidelines are not binding.

3. Conflict between GIPA and PIPP/HRIP Acts

The objectives of the Act are in conflict with the objectives of the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002* (the HRIP Act). The Act promotes accessibility of all government information and PIPP/HRIP Acts conversely promote protection of personal and health information and what it is used for. Resolution of conflicting principles would provide greater clarity for agencies in determining access applications

4. Conflict with Copyright Act and Environmental Planning and Assessment Act and Regulation

Consideration needs to be given to reviewing the Act to temper the conflict of the Act with the *Copyright Act 1968 (Cth), Environmental Planning and Assessment Act 1979* and *Environmental Planning and Assessment Regulation 2000 (NSW).*

The *Copyright Act 1968 (Cth)* governs the copying of information and contains provisions which confer exclusive rights to copyright owners which have the effect of prohibiting publication of copyright material on websites or provision of copies unless the copyright owner has expressly consented.

The *Environmental Planning and Assessment Act 1979 (the EPA Act)* contain provisions which require Council to make development applications (DA) and accompanying information, including plans, publicly available, and provides a right for people to inspect and make copies of the plans during the submission period.

The *Environmental Planning and Assessment Regulation 2000 (NSW) (the EPA Regulation)* provides that councils and other persons using the DA plans and documents in accordance with the *EPA Act* are entitled to claim an indemnity from the person who applied for the DA to cover costs they incur arising from claims they have infringed copyright in the plans and the DA, where these materials were being used in accordance with the *EPA Act.*

Copyright protected material submitted to Council is not to be published, copied or distributed unless Council has copyright owner's express consent to do so. Such material however may be viewed by the public.

Copyright protected material submitted to Council as part of a Development Application (DA) may be published, copied or distributed during the submission period for the DA only (having regard to the limited indemnities offered from copyright infringement by cl.57 of the *EPA Regulation*). Any other identified copyright protected material relating to matters other than DAs is not to be published on the Council's website under the *GIPA Regulation.*

Section 6 of the Act requires Council to make open access information publicly available. A significant amount of open access information particularly that relating to DAs is copyright protected. Sub-section 6(6) of the Act however provides that an agency is not required to make open access information available that would be an infringement of copyright. Council could interpret this as not being required to provide access to any copyright protected material. This limits Council's ability to function as it needs to and make vital information freely available to the public in order that they are fully informed and act accordingly. It is also a significant deviation from the objects of the Act.

Other than the limited indemnities offered from copyright infringement by cl.57 of the *EPA Regulation,* Councils are offered no protection from copyright infringement in making certain open access information available. A remedy would be to press for amendment to the *Copyright Act 1968 (Cth)* to exempt local government from copyright where a statute requires public access and the use of material lodged with council to conduct its business.

5. Fees and the cost of processing formal access information

Application fees, processing costs and review fees for formal access applications remain unchanged and it is the view that they are an unfair and unreasonable contribution to the cost of Council determining an application. An applicant should be required to contribute a more realistic level of fees and the fees be maintained in real terms through annual indexation or periodic review.

Section 67 of the Act provides that an agency cannot impose any processing charge for the first 20 hours of processing time for an access application for personal information about the applicant. Council's experience is that the scope of many applications covers both personal and other information and where personal information is involved, no processing costs are paid for the first 20 hours. In complex applications where little personal information is involved, the majority of the work conducted by Council relates to non-personal information and Council receives little contribution towards costs. It is considered that section 67 should be amended to refer to access application for personal information 'solely'.

6. Abuse of access applications and rights of review

Council is mindful of instances where an inordinate amount of agency resources has been consumed in order to deal with a single applicant who is pursuing a claim against an agency. Use of applications to NCAT and IPC for review of decisions where some information is not released, which demonstrate a conclusive presumption of an overriding public interest against disclosure in the public interest test, as leverage in pursuing claims against an agency is not uncommon.

Amendment to the review provisions of the Act requiring payment of a realistic lodgment fee or bond to ensure the integrity behind an application or the awarding of costs to an agency where the applicant is found to have acted maliciously or vexaciously may be considerations. A limit on the number of applications for review the applicant can lodge with NCAT and IPC at any one time may also offer a solution.

Yours sincerely

Veronica Lee
GENERAL MANAGER

cc LGNSW