



29 August 2014

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

By email: [justice.policy@agd.nsw.gov.au](mailto:justice.policy@agd.nsw.gov.au)

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

I refer to the invitation by the Department of Justice to make a submission in relation to the review of the *Government Information (Public Access) Act 2009* ("the Act").

Penrith Council welcomes the opportunity to make a submission in response to the review of the Act, and accordingly, Council provides the following submission.

Copyright

The issue of Copyright has caused Council some difficulty since the commencement of the Act. In this regard, I refer to sections 6(6) and 72(2)(c) of the Act.

Primarily difficulties have arisen where applicants (to formal and/or informal applications) seek access to copies of plans related to Development Applications (in most cases they may be open access documents), and they insist on obtaining copies of those plans, even where there is no apparent consent of the copyright owner.

More specifically, Council often finds itself in a difficult position when property owners seek copy access to architectural plans of their dwelling for the purpose of undertaking an extension, but the property owner was not the person who commissioned the original plan, and therefore has no intellectual property right over the plans. In some cases it is straight forward for an applicant to obtain the consent of the copyright owner; in others it may be more complex.

Council acknowledges the two Knowledge Updates on Copyright under the GIPA Act, which were released by the then Office of Information Commissioner (OIC) in April 2011 and May 2012.

In relation to the latter of those two updates, the then OIC suggested that where an applicant insists on copy access, that Councils should place a disclaimer notice above any photocopier available to the public. It is this officers

view that is a risky exercise, as Council still may be exposed to a claim pursuant to s.36(1) of the *Copyright Act 1968 (Cth)*, where it allows an applicant to take possession of a document, knowing that the applicant is going to use that document to make a copy. Further, the suggestion by the former OIC becomes impractical where there are no photocopying facilities available to the public in a Councils Civic Centre, as is the case at Penrith.

At the time of drafting this submission, Penrith Council finds itself the subject of an application by an applicant to the NSW Civil and Administrative Tribunal (NSW CAT) in relation to a decision by Council to grant an applicant view only access to a survey plan. Relevantly, the applicant seeks a copy of the relevant plan, but the copyright owner has denied consent for a copy to be made. At the time of this submission, that matter has been given a timetable for filing evidence in the NSW CAT. It is worth noting that the Council's decision was supported by the Office of the Privacy Commissioner in response to a request for review to that office by the applicant.

This form of dispute/review could be avoided, and government information could be made more easily available to the public, if the Act is amended in the manner that is suggested below.

Council readily accepts the indemnity available to Councils pursuant to s.158A of the *Environmental Planning and Assessment Act 1979* (the EPA Act), but that indemnity is only available for the functions Council performs pursuant to that Act. That indemnity doesn't extend to the functions Council performs pursuant to the GIPA Act.

It is recommended that the GIPA Act be amended to include a provision that has a similar effect to s.158A of the EPA Act. For instance, a clause could be inserted to provide agencies with an indemnity against a breach of copyright by applicants where applicants insist on obtaining a copy of records that are subject to copyright protection.

Council understands that the *Copyright Act* contains "fair dealing" provisions with respect to making copies of copyright documents. Council does not consider it reasonable for an Information Officer to determine whether the copying of a copyright document would benefit from the fair dealing provisions.

If an amendment to the Act in the form suggested above is not supported, then I refer the Department of Justice to the report by the Australian Law Reform Commission (ALRC) (November 2013) to the Federal Parliament in relation to Copyright and the Digital Economy. In that report the ALRC recommends that the Commonwealth amend the Copyright Act to extend the exceptions for judicial proceedings to Commonwealth, State and Local Governments. Council

would support the Department of Justice advocating to the Federal Parliament for such amendments to be made to the Copyright Act.

### **Open Access Information**

Councils are required to provide its Open Access Information (Schedule 1 of the Regulation) free of charge to members of the public. This includes all information regarding Development Applications.

At times, this causes an unreasonable diversion of Council resources, particularly in relation to Development Applications. 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 that relates to unreasonable and repeated requests for Open Access Information.

A large proportion of Development Application records are hard copy documents which are stored in a separate facility to that of the Council's Civic Centre. The retrieval of those files is time consuming, and can cause significant pressure on and diversion of the Council's resources.

Council requests that the review consider:-

1. Inserting a provision in the Act for unreasonable diversion of resources in relation to requests under the Act for Open Access Information;
2. Limits on the number of requests a person can make in a year for the same Open Access Information;
3. The ability to charge if a person requests the same information on multiple occasions; and
4. 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 eg. where the record is held in a separate location to the main offices of the Council, a fee could be imposed.

### **Fees under the Act**

Council acknowledges that one of the objects of the Act is to encourage proactive release of government information, in order to ensure openness, transparency and accountability of governments and agencies.

Setting fees to access government information should be carefully considered so that they don't act as a deterrent to the public to access government information.

However, the fees need to be balanced against the cost to agencies in providing access to information. The current formal Access Application fee and processing fee of \$30 was included in the *Freedom of Information Act (1989)* (now repealed) at the time that Act commenced. There has been no increase in this statutory fee since 1989.

Given, the increased financial burden of storage and retrieval costs outlined above Council recommends that these fees be increased and provision is included in the Act for agencies to make annual increases of these fees in line with CPI.

Interaction of the GIPA Act and Privacy and Personal Information Protection Act 1998

The review should consider the interaction of the above two acts and attempt to resolve more clearly the conflict they provide for agencies in dealing with requests for information.

PIPPA promotes the protection of personal information and only using information for the purpose it was collected for, whereas GIPA promotes the accessibility of all government information to the public.

Again, Council welcomes the opportunity to make this submission to the review of the Act.

Yours faithfully

A handwritten signature in cursive script, appearing to read 'M Bullivant'.

Matthew Bullivant  
**Senior Legal Officer**