SSROC
SOUTHERN SYDNEY REGIONAL ORGANISATION OF COUNCILS

9 September 2014

The Director, Justice Policy
Department of Justice
GPO Box 6, Sydney NSW 2001
By email: Kathrina_Lo@agd.nsw.gov.au

Dear Sir/Madam

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

The Southern Sydney Regional Organisation of Councils (SSROC) is an association of sixteen municipal and city councils. SSROC provides a forum for the exchange of ideas between our member councils, and an interface between governments, other councils and key bodies on issues of common interest. Together, our member Councils cover a population of over 1.6 million, or one third of the population of Sydney.

The enclosed joint submission was prepared on behalf of SSROC in response to the NSW Attorney General's review of the *Government Information (Public Access) Act 2009* pursuant to section 130 of the Act.

SSROC's key recommendations in relation to the GIPA Act are as follows:

1. **Open Access Information**
   - **A provision should be included to enable an agency to claim an 'unreasonable diversion of resources' in relation to requests for open access information;**
   - **Open access documents as listed in Schedule 1 of the GIPA Regulations should only relate to the most recent development applications. Access to previous development applications should be subject to a formal charging regime;**
   - **Agencies should be able to recoup photocopying and retrieval costs for open access applications; and**
   - **The Act or Regulation should provide a clear definition of 'unreasonable diversion of resources'.**

Lvl 2, Suite 2E, Hurstville House
34 MacMahon Street
Hurstville

PO Box 536
Hurstville NSW 1481

Ph: 9330 6455
Fx: 9330 6456
Email: ssroc@ssroc.nsw.gov.au
Web: www.ssroc.nsw.gov.au

2. **Fees under the Act**
   - **The application fee and processing charges for (formal) Access applications be indexed and subject to periodic increases to ensure charges imposed remain reasonable.**

3. **Interaction of GIPA and PIPPA Acts**
   - **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**

4. **Government Contracts Register**
   - **A 'material variation' to a government contract should be defined in the GIPA Act or advised by way of a Guideline from the Office of the Information Commissioner**

5. **Copyright**
   - **Representations be made to the Commonwealth Government supporting the Australian Law Reform Commission's recommendation 15.4 in their November 2013 report *Copyright and the Digital Age,* and seeking an amendment to the Copyright Act in the terms of the recommendation.**

Further explanation of these recommendations is included in the attachment to this letter. If you require further information or clarification regarding any of the recommendations outlined in this submission please contact me on 02 9330 6455.

Yours Faithfully,

Helen Sloan
Acting General Manager
Southern Sydney Regional Organisation of Councils

Cc: Elizabeth Tydd, Information Commissioner, CEO Information and Privacy Commission

Attachment: Background to SSROC Recommendations

1. Open Access Information

NSW Councils are required to provide 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 can cause a financial burden to councils particularly in relation to providing access to records dating back up to 100 years. Additionally, 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. Many councils, store older hard copy development application files at off-site storage facilities, as the cost involved in scanning these files is significant. Costs to retrieve files from off-site storage facilities and photocopying need to be considered.

The Act provides an 'unreasonable diversion of resources' clause [s53(5)], but this only relates to (formal) Access applications. Extending this clause to include open access applications will assist agencies to recoup costs when it is apparent that these requests will require significant resources to process them.

The Act and Regulation do not define the term 'unreasonable diversion of resources'. A definition of the term would greatly assist us in assessing applications.

Recommendation 1

- **A provision should be included to enable an agency to claim an 'unreasonable diversion of resources' in relation to requests for open access information.**
- **Open access documents as listed in Schedule 1 of the GIPA Regulations should only relate to the most recent development applications. Access to previous development applications should be subject to a formal charging regime.**
- **Agencies should be able to recoup photocopying and retrieval costs for open access applications.**
- **The Act or Regulation should provide a clear definition of 'unreasonable diversion of resources'.**

2. Fees under the Act

The $30 application and $30 per hour processing fees were introduced in 1989 under the previous Freedom of Information Act. There has been no increase in this statutory fee since 1989. It is noted that under GIPA, the processing fee can only apply after the first hour of processing; and that for applications from an individual for their own personal information; no processing charge can be made for the first 20 hours of processing time. This further limits the cost recovery to process an application under the GIPA Act.

The fee structure should be reviewed as part of the GIPA Act review and consideration be given to an amendment to the Act to enable agencies to make annual increases to these fees in line with the Consumer Price Index (CPI).

Recommendation 2

- **The application fee and processing charges for (formal) Access applications be indexed and subject to periodic increases to ensure charges imposed remain reasonable.**

3. Government Contracts Register – Material Variations

Currently, no definition of 'material variation' to a contract is provided within section 33 of the GIPA Act and this term remains open to interpretation, resulting in inconsistencies with Contract Registers appearing on Council websites.

As part of the GIPA Act review, consideration should be given to stipulating a minimum percentage or degree of variation constituting a 'material variation' in government contracts.

Recommendation 3

- **A 'material variation' to a government contract should be defined in the GIPA Act or advised by way of a Guideline from the Office of the Information Commissioner.**

4. Interaction of GIPA and PIPPA Acts

The IPC office incorporates the Privacy Commissioner. There could be potential conflicts, at least of intent if not operation, between the objectives of the Privacy legislation and GIPA. 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.

Recommendation 4

- **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**

5. 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.

On 14 March 2012, the NSW Parliament amended section 6 of the GIPA Act by adding a new clause (6) to state that nothing under section 6 of the Act or the GIPA Regulations requires or permits an agency (Council) to make information available in any way that would constitute an infringement of copyright.

Legal advice received from the Crown Solicitors Office and the Senior Counsel went on to consider possible defences under the Copyright Act such as an 'implied licence' or 'fair dealing', however, neither the Crown Solicitor's Office nor the Senior Counsel supported any of these defences in relation to the GIPA Act.

Many councils now 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.

In November 2013, the Australian Law Reform Commission released its final report on the review of the Copyright Act titled *Copyright and the Digital Economy*. Chapter 15 of this report discusses Government Use and considers, among other things, exceptions to the Copyright Act which would apply to 'uses where a statute requires public access'. (Clauses 15.44 to 15.71)

Clauses 15.53, 15.54, 15,55 & 15.56 relevantly state:

15.53 Local governments are subject to state and territory FOI laws, and they are not covered by the statutory licence of the Copyright Act. The effect is that they risk copyright infringement when using copyright material in a way that is required by an FOI law. It has been necessary to make special provision in FOI laws so that, if access to a document in a form requested would breach copyright, then access in that form may be refused and access given in another form. The only form of access that does not breach copyright is making the document available for inspection, which is an inadequate approach in the digital age.

15.54 Limits on laws requiring governments to make information available proactively have also been enacted – for example, The Government Information (Public Access) Act 2009 (NSW) (GIPA Act) was amended to provide that an agency is not required to make 'open access information' available if this would infringe copyright. This approach gives blanket and inflexible protection for copyright material, and does not further the aim of open government. The NSW Information and Privacy Commission (NSW) stated that the risk of infringing copyright 'undercuts the transparency and effectiveness of the GIPA Act by

limiting councils' ability to provide public access to documents that inform the basis of their decisions.'

15.55 *Planning and environmental protection laws often require a person to provide documents to a government agency, and require the agency to provide public access to the documents, For example, the proponent of a development is usually required to submit a development application, which may include surveys, architects' plans and environmental impact statements. The proponent pays the various professionals commercial rates for their work. The purpose of the laws is to facilitate public participation in planning processes, with the expectation that this will improve decision making.*

15.56 *Providing public access to a development application, including the copyright material contained within it, raises similar issues to disclosure under FOI laws. Commonwealth statutes requiring public access to documents can create immunity for Australian Government Agencies. However, state and territory governments cannot take advantage of immunity and may be liable for payment under the statutory licence. Local governments have no immunity and no statutory licence, and risk copyright infringement when providing public access to documents.*

Recommendation 15.4 of this report states that:

The Copyright Act should provide for a new exception for uses where statutes require local, state or Commonwealth governments to provide public access to copyright material.

This recommendation is strongly supported. Therefore, as part of the review of the GIPA Act, we request that representations be made to the Commonwealth government in support of the Australian Law Reform Commission's recommendation and seeking an amendment to the Copyright Act in these terms as soon as possible.

Recommendation 5

- **Representations be made to the Commonwealth Government supporting the Australian Law Reform Commission's recommendation 15.4 in their November 2013 report *Copyright and the Digital Age,* and seeking an amendment to the Copyright Act in the terms of the recommendation.**