

***Government Information (Public Access) Act 2009
(NSW)***

Review Submission August 2014

SUBMISSION TO:

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Introduction

A review of the *Government Information (Public Access) Act 2009* (NSW), ('*GIPA Act*') is currently being undertaken by the NSW Information Commissioner under s 130 of the *GIPA Act*.

This review is to determine whether the policy objectives of the *GIPA Act* remain valid and whether the terms of the *GIPA Act* remain appropriate for securing the *Act's* objectives.

The objectives of the *GIPA Act* are 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 and
- b) giving members of the public an enforceable right to access government information; and
- c) providing that access to government information is restricted only when there is an overriding public interest against disclosure.

Submission

Tweed Shire Council ('Council') welcomes the opportunity to make a submission to the review of the *GIPA Act*. While Council recognises the two competing policy objectives of the *GIPA Act* to maximise open decision making and accountability by Government on the one hand and protecting genuine confidential information on the other the balancing of these competing objectives is a difficult task.

1. The proactive release of government information

Council receives on average 18 informal requests for open access information mainly falling within sch 1 of the *Government Information (Public Access) Regulations 2009* (NSW) per week. According to s6 (3) of the *GIPA Act* Council must provide access to this kind of information at least one way free. In contrast s 608(2) of the *Local Government Act 1993* (NSW) ('*LGA*') allows Council to charge and recover an approved fee for any service it provides except where excluded. The giving of information is a service for which a fee can be charged under the *LGA*. The *Environmental Planning and Assessment Act 1979* (NSW) also sets fees for copies of documents like a building certificate.

Council recognises the need to maximise open decision making and accountability of government agencies. However this objective needs to be weighed against the cost burden placed on Local Government and the broader rate base, being the community, particularly when the *LGA* permits a fee to be charged. Council does not have the human or financial resources to place all open access information on its website.

Although Council is authorised by s 8(3) of the *GIPA Act* to refuse to disclose information sought in an informal request it rarely does. However consideration should be given to adding an additional clause that permits Council to refuse to deal with an informal request for government information if the disclosure would require an unreasonable diversion of Council resources.

It has been Council's experience that it is often the same people who lodge multiple information requests, often fishing for information to selectively release in a public manner in an attempt to portray an image they wish to portray. This is not in the public interest and the public are effectively funding the misuse of information as Council does not have the ability to charge for access.

It is therefore recommended that the Act be amended to provide for one free access per annum per individual (this maintains the intent of open and accessible information) and unlimited on files related to personal matters, while subsequent GIPA requests should be allowed to be charged for on a full cost recovery basis. This still maintains access to government information but is not diverting resources from other government or council resources.

2. An enforceable right to government information

Council received 19 formal applications (which were broad and exhaustive in nature – for example “All correspondence between the Mayor and former General Manager, including emails, file notes, memo's, hand written notes, diary notes, meetings attended together, phone records, SMS”) for government information under pt 4 of the *GIPA Act* in the last financial year. While s 60 of the *GIPA Act* permits Council to refuse to deal with an application because to determine the application would require an unreasonable diversion of Council resources, this did nothing to deter applicants from requesting vast amounts of information on repeated occasions, or vast amounts of unrelated information with no identifiable purpose. Information that was released, was subsequently extracted and selectively released to portray an image to the media that on its face value could be concluded in a certain way, but in context of all of the information is very different in nature. It is hard to perceive how such action is in the public interest. It has been clear that GIPAA has been utilised as a weapon for political or personal gain.

The consequence of the misuse of the Act in this manner is that it creates a culture within the public service that discourages record keeping.

In all 19 applications Council met the required period for determining applications under pt 4, div 1 of the *GIPA Act* but found when consultation was required under s 54 of the *GIPA Act*, Council often had to follow up on the request at its own cost.

Council must provide access to information it releases under pt 4 of the *GIPA Act* unconditional according to s 73 of the *Act*. In addition Council must have a disclosure log under pt 3, div 4 of the *GIPA Act* which contains certain information set out by the *Act*. As mentioned above, there were instances where Council unconditionally released information which was subsequently misinterpreted by the media and reported out of context.

The cost burden on Council to administer the *GIPA Act* exceeds the current fee and processing charge. Consideration should be given in legislation to an annual review of fees and charges aligned to Indexation.

3. Restricting government information on an overriding public interest

Council recognises the two competing policy objectives of the *GIPA Act* must be balanced to justify the public interest in both releasing and withholding government information. However the task is more complex when other legislation promises the confidentiality of certain information which cannot be assured under the *GIPA Act*. For example code of conduct and personnel matters.

a) Code of conduct investigation

Council received a Code of Conduct complaint from a resident in relation to a Council officer. Council investigated the complaint by interviewing the complainant, his wife and the relevant Council officer. Council then formally responded to the complainant detailing the outcome of the investigation.

The complainant then lodged an application under pt 4 of the *GIPA Act* requesting all information relating to the investigation. At issue was information of the Council Officer's interview. Council applied the public interest test set out in the *GIPA Act* and withheld the interview notes but in that decision Council was not permitted to take into account a confidentiality clause stated in the Office of Local Government Model Code of Conduct Procedure which Council had adopted. The Model Code explicitly restricts the disclosure of information relating to the management and investigation of code of conduct complaints.

The complainant then initiated a NSW Civil and Administrative Tribunal (NCAT) appeal but later withdrew.

All council staff received Code of Conduct training and have been informed of the confidentiality clause as a means of encouraging staff to be open and honest in any complaint issues. The various facets of legislation now place an imposition on staff in relation to the provision of information. As a result, the direct negative of the intent of the legislation is being fostered as a culture within the public sector.

b) Personnel performance appraisals

Council received an application under pt 4 of the *GIPA Act* requesting government information held about certain performance and contract appraisals that had been resolved by Council in a closed meeting. Section 10A (2) (a) of the *LGA* permits Council to resolve into a 'Committee of the Whole' to discuss confidential personnel matters in a closed meeting of the council. Again the *LGA* is clear in allowing a legitimate decision about personnel matters to be confidential, however this fact cannot be considered in determining the public interest test under the *GIPA Act*.

There have been several cases before NCAT such as *Clarke vs Blacktown City Council*, where the Council has been directed to release performance appraisals of the General Manager. As a consequence, it has encouraged public sector agencies and councils to review their current performance appraisal documents to simplify them with the mindset that anything documented is likely to end up in the public realm and potentially used to effectively character assassinate an individual for political or personal gain. This has consequently restricted the proper management function of an agency and has unnecessarily complicated good performance management of individual employees of an agency.

It is therefore recommended that the Act be amended to include an additional exclusion in Part 14 that denies release of personnel matters and files of employees of an agency including their performance reviews.

c) Draft reports or strategies of Council

Council received applications under pt 4 of the *GIPA Act* requesting various reports and strategies of which some included draft or consultancy reports which aim to inform Council reports and strategies. The requests for these draft reports can be very misleading as the

draft may have been prepared from a personal perspective and can contain erroneous information, until it has been peer reviewed and checked against the organisation's Policies to ensure accuracy. The release of these draft working documents can be very detrimental to the organisation in regards to the accuracy of information and from an organisational perspective, quite different to the final adopted report.

By way of a specific example is a Development Application report prepared by a junior Planner that includes draft conditions, or conditions that are not fully inclusive and may be inaccurate from a whole of organisation perspective (for example the junior officer may have failed to consider a DCP- Development Control Plan) or based on outdated fees, which if made available could be interpreted by the applicant, as being accurate without the full understanding of the finalisation of the report including the adopted conditions and applicable current fees. Council has had specific examples where a final report may have recommended refusal based on merit, but earlier drafts were in favour of approval prior to consideration or feedback from technical officers on issues such as Bush Fire (RFS- Rural Fire Service comments), Water and Sewer infrastructure issues, heritage, aboriginal cultural heritage, etc. Proponents have utilised GIPAA to obtain these drafts and have subsequently claimed bias, corruption, collusion, etc against council staff.

It is therefore recommended that the GIPA Act be amended to include an additional exclusion in Part 14 that denies release of draft documents.

d) Local Government Act 1993

Section 10A of the Local Government provides:

10A Which parts of a meeting can be closed to the public?

(1) A council, or a committee of the council of which all the members are councillors, may close to the public so much of its meeting as comprises:

- (a) the discussion of any of the matters listed in subclause (2), or
- (b) the receipt or discussion of any of the information so listed.

(2) The matters and information are the following:

- (a) personnel matters concerning particular individuals (other than councillors),
- (b) the personal hardship of any resident or ratepayer,
- (c) information that would, if disclosed, confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct) business,
- (d) commercial information of a confidential nature that would, if disclosed:
 - (i) prejudice the commercial position of the person who supplied it, or
 - (ii) confer a commercial advantage on a competitor of the council, or
 - (iii) reveal a trade secret,
- (e) information that would, if disclosed, prejudice the maintenance of law,
- (f) matters affecting the security of the council, councillors, council staff or council property,
- (g) advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege,
- (h) information concerning the nature and location of a place or an item of Aboriginal significance on community land,
- (i) alleged contraventions of any code of conduct requirements applicable under section 440.

It is therefore recommended that the GIPA Act be amended to include an additional exclusion for matters resolved by Council as Confidential under Section 10A of the Local Government Act.

e) Disclosure Log

Currently the GIPA Act provides the following in relation to allowing the suppression of application details within the Disclosure Log:

If the information sought is released to you and would be of interest to other members of the public, details about your application may be recorded in the Council's 'disclosure log'. This is published on the Council's website.

Do you object to this? Yes / No

To enable complete accountability and transparency this provision should be removed so that all Formal Access Requests released by the Agency are readily available through the Disclosure Log. If the Agency is required to provide the information in an open and transparent manner it accords that the application and applicant details should also be publicly available.

It is therefore recommended that applicant and application details be recorded on the Disclosure Log, without the option by the applicant of objecting to this occurring.

Conclusion

Council recognises the need to maximise open decision making and accountability of government agencies. However this objective needs to be weighed against the cost burden placed on Local Government both in supplying open access information and in determining applications under pt 4 of the *GIPA Act*.

An enforceable right to government information supports the policy objectives of making government more accountable and open. Council acknowledges the rights of the community to be given access to government information therefore Council should have the right to disclose the same information in its disclosure log. Actual transparency and accountability of Council decision making will be seen and the information cannot be reported out of context.

Council acknowledges the policy objectives of open and accountable government decisions making must be weighed against protecting genuine confidential government information, however the task for Local Government is more complex when other legislation promises the confidentiality of certain information which cannot be assured under the *GIPA Act*. The review of the *GIPA Act* should consider the position of Local Government in this context.

Council submits the following recommendations for consideration:

1. That the Act be amended to provide for one free access per annum per individual (this maintains the intent of open and accessible information) and unlimited on files related to personal matters, while subsequent GIPA requests should be allowed to be charged for on a full cost recovery basis. This still maintains access to government information but is not diverting resources from other government or council resources.

2. Consideration should be given in the legislation to an annual review of fees and charges aligned to Indexation.
3. That the Act be amended to include an additional exclusion in Part 14 that denies release of personnel matters and files of employees of an agency including their performance reviews.
4. That the GIPA Act be amended to include an additional exclusion in Part 14 that denies release of draft documents.
5. That the GIPA Act be amended to include an additional exclusion for matters resolved by Council as Confidential under Section 10A of the Local Government Act.
6. That applicant and application details be recorded on the Disclosure Log, without the option by the applicant of objecting to this occurring.

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