Submission to

Department of Justice

Government Information (Public Access) Act 2009 Review

29 August 2014

Preamble

Council considers the underlying principles of the Act and its objects are sound and go a long way to improving the public expectations of good government especially around:

- Authorising and encouraging the proactive public release of government information by agencies
- Giving members of the public an enforceable right to access government information
- Providing that access to government information is restricted only when there is an overriding public interest against disclosure

The objects of the Act align with Councils adopted *Community Strategic Plan 2033* strategies of Accountable and Transparent Governance and stated Outcomes.

Outcomes

1. Government, community and business talking and working together
2. A Council that demonstrates good business management and ethical conduct

Strategies

1. Best Practice Governance – *be a leader in best practice local government governance*
2. Customer Service – *deliver responsive and helpful services to all our customers*
3. Advocacy – *advocate strongly for the interests of Wollondilly and its community*
4. Resource Efficiency – *be efficient and effective in the use of Council resources and provide value for money in the delivery of services*
5. Corporate Image – *promote a positive representation of Council's corporate image*

This submission to the Department of Justice is based upon the practical implementation of the Act itself. Some of the provisions of this Act cause a disproportionate use of resources on agencies, particularly those which provide a wide range of services such as road maintenance, libraries, tips, parks, childcare services, etc. When reviewing the Act the Department of Justice is requested to consider the impacts of the Act on the resources of agencies which at times gives rise to an inequitable impact upon the provision of other services and to acknowledge that the sentiments herein are sourced through practitioners working with and discussing identified issues and are not isolated ideas/comments.

Thank you for the opportunity to provide a submission on the review of the GIPA Act. If you have any questions please contact the Principal Governance Officer, Toni Spence on (02) 4677 1107.

Yours Sincerely

Toni Spence
Principal Governance Officer

Summary of Issues

The following outlines Wollondilly Shire Council's general comments and issues with regard to the proposed Act review.

INFORMAL APPLICATIONS

- **Copyright**
- **Open Access Information**
- **Object of the Act**
- **Methods of Access**
- **Offences**
    - Standards of conduct

FORMAL APPLICATIONS

- **Oversight Body**
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- **Access Applications**
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- **Refuse to Deal**
- **Unreasonable Applicants**
- **Relationship between Acts**
- **Public Interest & Public Benefit**
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    - Public Interest Considerations
    - Harassment and Intimidation
- **Cost shopping**

Informal Applications

A range of issues are faced daily by the agency/council in processing Informal Access Applications. These are listed below:

Copyright

The debate on copyright is continuing with attempts to address the inconsistency between State and Commonwealth legislation.

Section 6(1) of the Act requires agencies/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 agencies/councils in providing copies of these documents as required under Act.

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.

Copyright implications for agencies/councils, in particular in relation to development applications pre and post determination is still an issue. Many agencies/councils still doubt whether the indemnity under the EPA Act pre-determination is sufficient to protect agencies/councils.

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 that local government be given an exemption to Copyright where a statute requires public access. Given this, we request 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 in order to resolve the copyright issues currently being experienced by local government.

Wollondilly Shire Council requests that the review considers:

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.

Open Access Information

NSW agencies/councils are required to provide its *Open Access Information* (Schedule 1 of the Regulation) free of charge to members of the public and this includes all information regarding Development Applications when 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 200 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.*

This also applies to an applicant constantly wanting progress reports and access to a Development Application prior to the notification stage of processing the Development Application.

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 councils 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.

Councils also receive requests that information contained in hard copy files is sent electronically. This means that hard copy files have to be sourced from off-site locations; scanned; redacted (where a breach of PPIPA or HRIPA would occur – this is generally information contained in submissions) and emailed or placed on CD.

There is also clear evidence of persons using councils to run a business i.e. requesting information in relation to Development Applications that have been refused to contact the owners and advocate on their behalf in lodging an appeal. This is a drain on council resources.

Wollondilly Shire Council requests that the review considers:

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.

Object of the Act

NSW agencies/councils are currently struggling with the increase in access requests which has an impact on council staff resources.

Part 3 [s1 (b)] states that *'members of the public have an enforceable right to access government information"*

Although this in essence may be true it also may be misleading in concept as it creates a perception that all information that is held by Council is accessible. In an age where electronic record keeping is widely used the requests are extending to emails and electronic devices as well as hard copy files and files in electronic files – this also places increased pressure in search capabilities.

The Act is also often used as a tool by disenfranchised or professional complainants to support personal vendettas rather than to encourage open and transparent government.

This is exacerbated where people have incurred restrictions for unreasonable and persistent harassing behaviour.

The impact on staff resources is noticeable for agencies/councils which do not have the capacity to employ dedicated staff to address formal applications and often the RIO is a person whom has a full time position and processes formal access requests as a part of their substantive role.

Wollondilly Shire Council requests that the review considers:

A change to [S1 (b)] that:

'members of the public have an enforceable right to apply for access to government information'

Methods of Access

With the increase of electronic document storage systems and phasing out of hard copy files the question is raised that an applicant can require a hard copy be provided even though they may only want one or two pages from a file or document which could be hundreds of pages in size.

The Act does not require council to provide access in hard copy but when questioned by an applicant council was informed that we provide access in whichever form the applicant requests.

If the Act requires councils to provide all open access information on its website (where practicable) it is ironic that councils are then required to provide information under an access application, in hardcopy.

In instances where an individual does not have the capacity to access information online or has a visual impairment then hardcopy files would be an appropriate medium.

However when an applicant uses social media and emails as their main form of dialogue it would be unreasonable to expect councils to provide hardcopy documents on demand.

Wollondilly Shire Council requests that the review considers:

That agencies/councils are not required to provide hardcopy documents in response to access applications to save resources and costs associated with printing large amounts of information, where it is appropriate.

Offences

Standards of conduct

The Offence provisions in the Act are not reasonable or equitable. There are offences for agencies/council staff, as there should be, but in regard to private persons this is where the Act falls short.

The Informal Access provisions of the Act [s8 (2)] state *"an agency can release government information in response to an informal request subject to any reasonable conditions that the agency thinks fit to impose".*

No conditions that an agency/council imposes on the use of information are legally binding and carry no offence provisions. This does not stop a person from using the information anyway that they want to even if the information is released conditionally. This includes breaches of Privacy and the use of social media.

Wollondilly Shire Council requests that the review considers:

That offence provisions for private persons that are enforceable are implemented in the Act.

Oversight Body

Role of Information Commissioner

The role of the IPC as stated in the Act is

(b) to provide information, advice, assistance and training to agencies and the public on any matters relevant to this Act

(c) to assist agencies in connection with the exercise of their functions under this Act, including by providing services to assist with the lodgement, handling and processing of access applications.

The IPC although open to assist will not offer advice as they may be required to review a matter and even generic requests are not generally responded to. Often agencies/councils are requested to put questions in writing, however as most matters are time sensitive due to legislative requirements in the Act answers are not forthcoming within the timeframe, if at all.

Although the CEO of agencies must delegate the authority of the RIO to particular staff members and there are approved training association's available, interpretation of the Act is always subjective.

There appears to be no support for requests for interpretation of the Act especially in particular instances other than through council's legal providers. This can often lead to a strain on budgets.

If the IPC offered a more active role when advice is requested in relation to the Act, agencies/councils would be confident they are viewing the statute in the proper context and making informed decisions. This need not compromise the independence of the IPC as they could restructure their organisation so as to separate their investigative role from any support area and encourages the principles of open and transparent government.

Wollondilly Shire Council requests that the review considers:

Change to [s17 (c)] of the Act as follows:

> "*must assist agencies in connection with the exercise of their functions under this Act, including by providing services to assist with the lodgement, handling and processing of access applications,*

OR alternately an addition to the provisions:

> *"that the structure of the IPC include an advisory section separate to its investigative section to provide services to assist with the lodgement, handling and processing of access applications"*

Fees

The $30 Application and Processing fee was 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 previously in this submission this is placing a cost burden on agencies/councils.

The current feeling within agencies/councils is the fees are frozen in 1989 terms and we are expected to do more for less. Fees need to be made more realistic to match the ever increasing demands for access to records that draw resources away from the key operational / asset replacement functions that we are responsible for.

Wollondilly Shire Council requests that the review considers:

That the fees should be increased and provision included in the Act for agencies/councils to make annual increases of these fees in line with CPI.

Access Applications

Excluded Information

The Act states at [s43 ss1] – *an access application cannot be made to an agency for access to excluded information of the agency*

If an application is received by an agency for excluded information of another agency, does the third party have to be consulted if there is an overriding public interest against disclosure and there is no intention to release information.

Where an application is received by an agency for excluded information of another agency, particularly in its investigative functions, and the agency is consulted and has no objection to provide the applicant with information of a confidential nature – if agencies/councils release that information the information becomes "public". Does this force the agencies/councils to breach the confidentiality provisions of the Act?

Wollondilly Shire Council requests that the review considers:

Amend Schedule 2 to read:

a) *An access application cannot be made to an agency for access to excluded information of the agency* (Unless there is an intention to disclose the excluded information and the agency consents to disclosure)

Additions:

b) Code of Conduct Matters – review, complaint handling and investigative functions
c) An agency is indemnified under any Act which prevents disclosure of certain information against prosecution where the third party consents to disclosure

Reviews

Consultation

Where council decides to provide access to information in response to an application and an objection to the release of this information is received it is not clear as to what review rights are available to an agency that has been consulted as a third party and objected to the release of their business information which has been released by that agency. The Act continues to refer to the applicants rights of review.

Wollondilly Shire Council requests that the review considers:

That the rights of review are extended to include reference to third parties and clarification is sought regarding the rights of business information of an agency.

Internal Review Fee

It is not clear if the applicant, being a person or third party agency is required to pay a fee for an internal review.

Wollondilly Shire Council requests that the review considers:

Clarification regarding fees for internal reviews and strengthening of this provision may be required.

Internal Review

There is currently no Mandatory internal review required under the Act. In fact the Act contradicts the internal review provision of [s 82] which provides:

"(1) A person aggrieved by a reviewable decision of an agency is entitled to a review of the decision by the agency that made the decision (which is referred to in this Part as an internal review)

With the provision of [s 89] Right to have decision reviewed by Information Commissioner

"(2) A reviewable decision must be the subject of an internal review by the agency under this Part before it can be reviewed by the Information Commissioner unless:

(a) the aggrieved person is the access applicant,"

Since the majority of requests for an external review fill the requirements of this provision i.e. an external review is requested by the applicant – there is no mandatory requirement for an internal review of a reviewable decision.

Review Period

The period in which to provide an internal review should be extended to at least 20 days given that a review must be treated as if it is a new application. To provide a thorough process the time required to assess the application should be at least allow for this.

When a matter is subject to an external review agencies/councils are often required to obtain legal advice which can be costly to the public purse.

Wollondilly Shire Council requests that the review considers:

"*(2) A reviewable decision must be the subject of an internal review by the agency under this Part before it can be reviewed by the Information Commissioner unless:*

a) the aggrieved person is a third party or an agent on behalf of a third party, or
b) an internal review of the decision is not available to the aggrieved person under this Part, or
c) the aggrieved person has already requested and had finalised an internal review by the agency

External Review

As there are no timeframes for reviews to be managed (other than the 40 days in which to request a review) this can mean many months before a matter is dealt with and a decision on a review made.

Wollondilly Shire Council requests that the review considers:

(5) The Information Commissioner must decide an application for external review of an agencies decision and give the agency and aggrieved person notice of the Information Commissioners decision within 40 working days (the review period) after the Information Commissioner receives the application for external review.

Refuse to Deal

NSW agencies/councils may refuse to deal with an access application (in whole or in part) under the provisions of [s60 (1)] of the Act.

Section 60 provides:

(1) An agency may refuse to deal with an access application (in whole or in part) for any of the following reasons (and for no other reason):

a) dealing with the application would require an unreasonable and substantial diversion of the agency's resources
b) the agency has already decided a previous application for the information concerned (or information that is substantially the same as that information) made by the applicant and there are no reasonable grounds for believing that the agency would make a different decision on the application.

b1) the applicant has previously been provided with access to the information concerned under this Act or the Freedom of Information Act 1989,

c) the applicant has failed to pay an advance deposit that is payable in connection with the application
d) the information is or has been the subject of a subpoena or other order of a court for the production of documents and is available to the applicant as a result of having been produced in compliance with the subpoena or other order.

In the case where a person has made an access application which is currently being reviewed by an external review body an additional clause is required to prevent them from making an application for the same (or substantially the same) information until the review has been finalised.

There is also no provision on dealing with multiple applications from an unreasonable applicant (as defined in the Ombudsman "Management of Unreasonable Complainant Conduct" Practice Manual.

Wollondilly Shire Council requests that the review considers:

a) including a provision under [s60] that allows agencies to refuse to deal with an application currently subject to a review by an external review body until such time as the review is finalised
b) that in the instance that multiple applications are received from an unreasonable applicant, the applications are refused and deemed as unmeritorious

Unreasonable Applicants

As previously outlined in this submission NSW Agencies/Councils are faced with an increase in applications under the Formal requirements of the Act by unreasonable requests from disenfranchised or professional complainants to support personal vendettas rather than to encourage open and transparent government.

The NSW Ombudsman and Office of Local Government (OLG) both have provision in their respective roles for dealing with "unreasonable applicants". This extends to "Special Complaint Management Arrangements" or in the case of the NSW Ombudsman activation of the "Unreasonable Complainant Conduct Policy".

The only provision for dealing with these issues in the GIPA Act is under [s110] *"Orders to restrain making of unmeritorious access applications".* To satisfy the provisions of this section of the Act an application must be regarded as lacking merit.

The current regime for proving applicants unreasonable actions is too onerous for agencies.

There are only three (3) circumstances where an application can be deemed unmeritorious and this can be imposed:

a) the agency decided the application by refusing to deal with the application in its entirety, or
b) the agency decided the application by deciding that none of the information applied for is held by the agency, or
c) the access applicant's entitlement to access lapsed without that access being provided (including as a result of failure to pay any processing charge payable).

Where an agency has entered into a "Special Complaint Management Arrangement" or initiated the "Managing Unreasonable Complainant Conduct" Practice Manual the GIPA Act is being used to circumvent these conditions.

Wollondilly Shire Council requests that the review considers:

1. Introduce a provision that enables an agency/council to reject a formal application under the Act while the conditions of a Special Complaint Management Arrangement by the Office of Local Government or NSW Ombudsman are in force.
2. The Act or IPC guidelines should apply the Ombudsman's definitions for unreasonable conduct.
3. Include a provision for the Information Commissioner to enter into or impose a special access management arrangement similar to 5.39 of the *Procedures for the Administration of the Model Code of Conduct*

Relationship between Acts

The NSW Ombudsman in administering the *Freedom of Information Act* created two manuals to assist agencies to carry out the functions of the Act. The last FOI Manual was written in 2007 and included an extensive definition of *"personal information"* and how it connected with the FOI Act.

The relationship between the GIPAA; PPIPA; HRIPA and State Records Act needs to be clarified.

Wollondilly Shire Council requests that the review considers:

That the relationship between the GIPAA; PPIPA; HRIPA and State Records Act is clarified in more detail in the Act or a Guideline is developed.

Public Interest and Public Benefit

Public Interest Test

Agencies have to consider the overriding *public interest* test when deciding whether or not to release/withhold information requested. This is a particularly onerous task and this is reflected in the findings of NCAT Caselaw (see NSWCATAD 113).

Coupled with this, if the applicant also requests reduced charges for *public benefit* reasons the council has to apply another *public interest* test.

This in effect requires two public interest tests on the same application. Given that the charges are in relation to the time it takes to process an application not the information or documents released it could be argued it is not in the public interest to tie up agency/council resources to determine whether there should be a reduction in the fee.

Wollondilly Shire Council requests that the review considers:

That the reduction in fees for processing applications be applied only in the instance of financial hardship.

Public Interest Considerations

Section 54 (2) provides that *'Information relating to a person is of a kind that requires consultation under this section if the information: (a) includes personal information about the person'*

The requirement to consult with third parties when their personal information is contained in a record often causes stress to those third parties, especially if the application is in relation to neighbourhood disputes and complaints. Agencies should be given the option of deciding to delete the personal information from a copy of the record instead of consulting, when releasing this personal information is likely to cause stress, harassment or intimidation to those third parties (unless the personal information was specifically requested).

Wollondilly Shire Council requests that the review considers:

The addition of a new provision under [s 54] that allows the decision maker to remove personal information (where it is not requested) without the requirement for consultation

Harassment & Intimidation

The table to [s14 (3)] provides *'there is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to…(f) expose a person to a risk of harm or of serious harassment or serious intimidation'*

The feedback from NCAT, IPC and Crown Solicitors office suggests that the word 'serious' is to the extreme end of the scale and the consideration is often found not to be serious enough to sway the balance against disclosure. Staff of agencies are not qualified or experienced enough to determine if a person is at risk of 'serious' harm, harassment or intimidation, this should be left to the professionals.

Wollondilly Shire Council requests that the review considers:

Amending the Act at [s14 (3) (f)] to replace the word 'serious' with 'reasonable' as this is more realistic

Cost Shopping

The processing charges and advance deposits referred to in [s 64] of the ACT may be imposed for dealing with an access application. The charges are specified in the ACT and may be applied by all agencies/councils which process access applications. There have been occasions where an access applicant has made applications with multiple agencies/councils for the same information and the processing charges have not been applied by all agencies/councils.

The applicant then complains to an oversight body that they have been charged by one agency but not another and requests a review of the decision under [s 80 (j)].

Wollondilly Shire Council requests that the review considers:

Changing the provisions of [s 80] to include the following:

"Note: a decision to impose a processing charge or to require an advance deposit is not a reviewable decision where the applicant has applied to multiple agencies for the same (or substantially the same) information and the other agencies have not imposed a processing charge."