

28 August 2014

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

New South Wales Division
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Dear Sir,

Review of Government Information (Public Access) Act 2009

This joint submission to the NSW Department of Justice has been prepared by the Australian Property Institute, NSW Division (API) and the Spatial Industries Business Association, NSW Regional Management Group (SIBA), as part of ongoing joint collaborative research efforts and dissemination of factual and dispassionate information about property rights and spatial information in Australia.

API and SIBA welcome the opportunity to respond to the review of the *Government Information (Public Access) Act 2009* (GIPA) and are pleased to provide the following submission:

API and SIBA support the object of GIPA, which is to maintain and advance a system of access to government information by the public in a manner which is open, accountable, fair and effective. It is recognised that GIPA was passed by the NSW Parliament in 2009 and, in the ensuing five years, significant changes in the expectations of the public in relation to access to government information have occurred. In particular, it is considered that the electronic dispersal of government information to the public, through various media such as the internet, social media and the smart phone, has raised the need for prompt access to government information.

The following submission has been prepared adhering to the sequence of GIPA as currently drafted:

- ***Division 1 Accessing Government Information***

It is noted that agencies must make government information available publicly unless there is an overriding public interest against disclosure of the particular information. The API and SIBA believe that clarity should be provided regarding the definition of “public interest” such that the information sought can be disclosed.

s.3 Information about development applications

Development applications under the *Environmental Planning and Assessment Act 1979* (EPAA) fall within a class of government information which requires easy and economic access to both applicants for development and interested members of the public. Some development, such as designated development, under the EPAA provides for third-party representation when development applications are the subject of trial before the Land and Environment Court of NSW. Generally, designated development is a class of development which is seen as having consequences which may be environmentally deleterious; hence third-party rights of appeal and formal representation before the Court have been a feature of the EPAA since enactment in 1979.

Significant research by applicants and third parties may be required seeking information held by the consent authority (e.g. Council) and other government departments and, under GIPA this research would incur significant cost. Any constraint upon open access to any information which is viewed as crucial to the determination of the development application must be avoided in all circumstances, excepting where there is an overriding public interest against disclosure of the information (see above).

Some development applications, including those for designated development, may necessitate access to information held by local Government or State Government agencies well into the past and hence the imposition of a processing fee for access is not supported by API and SIBA. Currently, GIPA provides for (viz s.64) a processing fee of \$30 per hour, for each hour of processing time for the application to access information. In addition, an application fee of \$30 can also be imposed in addition to the hourly processing charge of \$30 per hour. It is recognised that these charges, which are now five years old, may not represent a full cost recovery, however any increase in these charges in respect of information sought for development applications under the EPAA would significantly undermine the integrity of the enforceable right to access government information by the public, whoever that may be.

- *Division 5 Processing charges and advance deposits*

As previously mentioned, s.64 GIPA currently establishes a processing fee and an application fee for access applications. Apart from the previously mentioned need to access Local Government and State Government agencies information in matters pertaining to Development Applications, there is the increasing need for public access to such information when private property is to be acquired for the purposes of construction of infrastructure such as roads, railways, electricity transmission lines, ports or airports. In such matters, private property is commonly acquired under the *Land Acquisition (Just Terms Compensation) Act 1991* (LAJTCA) and where there is disputation between the parties, the issue of compensation arising from the compulsory acquisition is the subject of proceedings before the Land and Environment Court of NSW.

In such matters it is common for discovery of pertinent government information, which may go back many years to establish a threshold beyond which the proposed acquisition had not affected the value of the land of the dispossessed owner. The need to access such information is established law in *Woollams v The Minister* (1957) 2 LGRA 338 and *San Sebastian Pty Ltd v Housing Commission of NSW* (1977) 37 LGRA 191. In *San Sebastian*, it was held that not only infrastructure works already in place but even the effect of proposed works should be disregarded in assessing the compensation due to the dispossessed owner. It can be seen that this requirement places the researcher in the position of having to delve deeply into the history of a particular infrastructure proposal, which may require many hours of research to access the relevant information, such that the acquiring authority or the dispossessed owner can be fully and appropriately informed of the history of the particular infrastructure project.

To impose a cost on the parties seeking to discover such information represents a contradiction with the objects of LAJTCA which at s.3 (1)(a) states:

to guarantee that, when land affected by a proposal for acquisition by an authority of the State is eventually acquired, the amount of compensation will be not less than the market value of the land (unaffected by the proposal) at the date of acquisition;

- *Copyright*

API and SIBA is aware that concern has been expressed with regards to the impact of the *Copyright Act 1968* (Cwth.) about the release of government information and as a result it is noted some councils have sought to remove information from their websites. It is noted that the Australian Law Reform Commission, in its report on such matters (viz ALRC R 122), has recommended that specific exemptions from the provisions of this legislation are warranted within the sphere of Local Government if such matters, as outlined in the API and SIBA submission above, are to be progressed to the benefit of public access to government information. API and SIBA support the similar view expressed by the Law Society of NSW in its recent submission to the review of GIPA.

- *Alignment with the NSW Open Data Policy*

It is critical to ensure that GIPA is consistent with the principles and objectives of the NSW Open Data Policy to avoid confusion and a consistent outcome by citizens and business requesting access to NSW Government data.

- *Clarity on commercial reuse rights*

Members of both the API and SIBA often acquire government data sets in order to support the completion of commercial contracts and or seeking to build commercial products using NSW Government data. GIPA should be clear on the right of applicants to copy, distribute, edit, remix, and build upon the released information for commercial purposes. An often used model includes the Creative Commons Attribution (CC BY). This license lets others distribute, remix, tweak, and build upon data, even commercially, as long as they credit source for the original creation. This is recommended for maximum dissemination and use of licensed materials.

Finally, API and SIBA would be pleased to discuss any of the matters raised in this submission or provide any additional information that may be requested. Arrangements can be made by contacting Gail Sanders OAM, API NSW Divisional Executive Officer on 02 9299 1811 or Francisco Urbina, SIBA NSW Regional Management Group Chair on 0412 311 439.

Yours sincerely,



Professor John Sheehan LFAP
Chair, Government Liaison
Australian Property Institute (NSW Division)