City of Canterbury

City of Cultural Diversity

Our Reference:
F-28-1

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

Dear Director

Subject Review of Government Information (Public Access) Act 2009

The City of Canterbury welcomes the review of the Government Information (Public Access) Act 2009 (GIPA Act) currently being undertaken by the Department of Justice.

We recently hosted a presentation by the Information Commissioner, Elizabeth Tydd, who reported on the operation of the GIPA Act in its first three years. I am pleased to note that local government has performed very well in this period, particularly with regard to response times (95% within statutory timeframe) and the granting of access to information requested (86% full or part access granted).

The GIPA Act has been in operation for over four years now, which has given us time to identify areas where some improvements could be made. It is hoped that the review will examine the balance between ensuring transparency and the difficulties that can sometimes arise in administering the Act. The following matters are raised for your consideration during the review of the Act.

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, including Canterbury, 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.**
- **We (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'.**

Fees under the Act

The $30 application and $30 per hour processing fees was 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.**

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.**

Copyright

Section 6(1) of the GIPA 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, it should be noted that some of the documents to which this requirement applies, such as plans, drawings, statements, reports etc. are protected by copyright legislation. The GIPA Act currently does not provide protection for councils in providing copies of these documents as required under the Act.

In March 2012, we sought direction from the Office of the Information Commissioner (OIC) with regard to the relationship between the Copyright Act and the GIPA and Environmental Planning and Assessment (EP&A) Acts and Regulations as follows:

> **'Copyright and the GIPA Act**
> During our preparations for the commencement of the GIPA Act, a number of councils, including Canterbury, approached the OIC seeking assistance and advice on how to fulfil our obligations under the GIPA Act regarding publishing, copying and distributing plans without infringing copyright laws. The OIC informed us about the legal advice received from both the Crown Solicitors Office and a Senior Counsel via the April 2011 Knowledge Update.
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> As you are aware, the Crown Solicitor's Office advised that, in relation to architectural plans and other copyright documents, copyright is infringed when someone other than the copyright owner acts, or authorises any act to be done, that is the exclusive right of the copyright owner unless the copyright owner has given consent for a person to undertake such action. The advice also stated that the Copyright Act is Federal Law and the Australian Constitution states that where Commonwealth Law and State Law conflict, the Commonwealth law will take precedence, unless the Federal law states otherwise.
>
> Therefore, the Copyright Act overrides the requirements of the GIPA Act and Regulation and local councils will be in breach of the Copyright Act when copying, publishing or distributing DA Plans and associated documents under the GIPA Act or Regulation without the consent of the Copyright owner. It was further advised that no breach of the Copyright Act occurs by providing viewing access only to copyright documents. The Crown Solicitor's Office advice was confirmed by a Senior Counsel.
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> Additionally, we note that, 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.
>
> While the legal advice 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', neither the Crown Solicitor's Office nor the Senior Counsel supported any of these defences in relation to the GIPA Act.

Copyright and the EP&A Act

The legal advice received by the OIC clarified the implications of the Copyright Act on the GIPA Act. However, it did not deal with the Copyright Act's implications on the Environmental Planning and Assessment (EP&A) Act. Therefore, we sought advice from our solicitors in order to gain clarification on our legal obligations with regard to copyright and the EP&A Act and Regulation, specifically clause 57 of the Regulation and the notion of any implied licence in copyright documents submitted as part of a DA.

On the question of whether clause 57 of the EP&A Regulation or any implied licence can be relied upon for us to provide copies of documents subject to Copyright Law to people without breaching copyright, the legal advice is very clear. It states that:

- Clause 57 means that the Council would be entitled to an indemnity from, and to be compensated by, the applicant in a development application for damage or loss suffered by Council resulting from a claim made against Council for breach of copyright. The indemnity may prove to be of no value if the applicant has insufficient financial resources to satisfy the amount awarded in a claim for breach of copyright.
- Where a development application and associated documents (including plans, drawings, statements and reports) and submissions made in respect of development applications are provided to the Council from individuals, organisations and government agencies, a licence to Council staff to copy those documents for internal use only would normally be implied to enable the Council to give the development application timely and proper consideration (including contemporaneous consideration by Council staff in different areas) unless there is an express prohibition on copying endorsed on the document by the owner of the copyright. It is the view of our solicitors that the implied licence would not extend to uses of the documents which involve copying of documents for distribution to the public or communicating them to the public via a website or other digital system.

Our current practice is to allow 'view only' public access to copyright plans and documents, submitted as part of the DA process, as it the only option legally available to us. Copies can be provided upon the submission of written consent from the copyright owner. To assist in this process, we have been providing copyright owner details to people seeking copies of documents and asking that they seek written permission from the copyright owners for copies of the documents to be made.

This issue has been the subject of consideration by our Council and it is our view that, while people can still view the plans and documents, the requirement to seek a copyright owner's consent is considered an inconvenience to adjoining owners and others who seek copies of plans and other documents, relating to a proposed development, for more detailed study.

> The only way that this situation can be remedied is by an amendment to the Copyright Act (Cth) to provide an exemption to local government bodies to enable them to supply copies of plans and associated documents for current DAs to interested parties.'

We requested the OIC to make representation to the Federal Attorney General seeking a review of the Copyright legislation to allow the proposed amendment. At the time, we also wrote to the Ministers for Local Government and Planning with the same request. Responses to our request referred to a review of the Copyright Act by the Australian Law Reform Commission.

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 and 15.54 relevantly state:
15.53 Local governments are subject to state and territory FOI laws, and they are not covered by the statutory license 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.'

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.

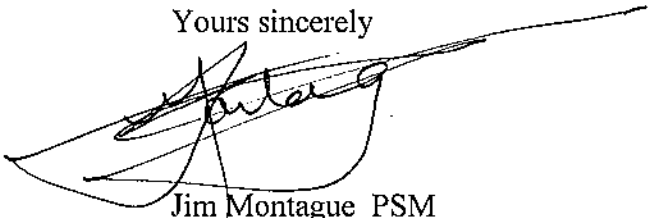
This recommendation is strongly supported. Therefore, as part of the review of the GIPA Act, we request that representations be made to the Commonwealth government in support of the Australian Law Reform Commission's recommendation and seeking an amendment to the Copyright Act in these terms as soon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

Recommendation 4

- **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.**

Thank you for providing us the opportunity to make a submission to the review of the GIPA Act. If you require further information or assistance, please contact my office on 9789 9447.

Yours sincerely



Jim Montague PSM
GENERAL MANAGER

27 August 2014

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