"Denys Clarke" <denys80@optusnet.com.au>

To <justice.policy@agd.nsw.gov.au>
cc

28/08/2014 02:13 PM

Subject Submission to the 2014 Review of the Government I

SUBMISSION TO THE REVIEW OF THE GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT

TRUTH is in the public interest. The public is all ways interested in the TRUTH

Getting the truth is a major problem because it relies on open, accountable, transparent and honest access to pertinent, accurate and timely information.
"If our democratic system is to survive, the right to speak the unvarnished truth needs to be nurtured, even protected" - **Ross Fitzgerald 13 November 2013.**
The 'old habits of secrecy and control' by Government has made it, and still is, too easy too often for those so interested to suppress and hide information that is in the public interest. It should not be possible to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.

In 2008, after many years of public discontent with FOI, The NSW Ombudsman called for submissions to a review he was conducting of the 1989 NSW FOI Act.

One submission simply said "no information should be withheld unless a prima facie case could be made to support the decision to withhold the information". The purpose of this submission was to reverse the situation which enabled a government/agency to deem, virtually at whim, that information should be categorised as confidential and withheld in the knowledge that, if challenged, it would involve costly finance time knowledge and effort by the challenger. By adopting the submission it would then require the government/agency to undertake this costly process impartially, accurately and in the first instance.

The resultant Ombudsman's report "Opening Up Government", in February 2009, noted "The conflict between the old 'secrecy regime' and the culture of openness represented by the FOI Act has not been resolved" and "access should only be refused if it can be demonstrated that releasing the information could reasonably be expected to cause some form of detriment or harm."

Another notable excerpt from this Opening Up Government report was :-
"When the Bill was introduced to Parliament, the then Deputy Premier quoted President James Madison: A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and people who mean to be their own governors must arm themselves with power that knowledge gives. This sort of grand

political language is not unique. It has accompanied the introduction of access to information legislation across Australia and around the world. However, most of these jurisdictions, with the possible exclusion of Sweden, have experienced a distinct cooling of political interest and support for effective FOI legislation. One of the central reasons for this reluctance to continue to drive change and improvement in this area is that, despite public comments to the contrary, releasing information goes against the natural instincts of government. FOI legislation creates a fundamental and significant conflict of interests for government and senior public officials. On the one hand, they have a duty to implement the legislation in accordance with its terms and spirit. However, implementing the legislation will quite often have a serious and occasionally damaging impact on their personal and political interests."

The Opening up Government report led to the Government Information (Public Access) Act 2009 - now commonly called The GIPA Act.

Impartial and accurate decision of what is in the public interest is paramount to the right to access information. GIPA's Public Interest Test addresses this requirement.

Soon after its legislation NSW Premier Nathan Rees said "GIPA and the digital revolution means government can never be the same again. We must enlist these Web 2.0 technologies in the cause of democracy and freedom. And that means changing the way we do business. First, it means greater openness. And that in turn means governments have to overcome old habits of secrecy and control. But we've got to begin the journey now"

Another noteworthy comment at the time was the report by Mathew Moore, FOI Manager at The Sydney Morning Herald, that "deciding just where the public interest lies will be the critical measure by which O'Donnell and the new laws will be judged. The existing law has been heavily criticised because of the ease and regularity with which requests for information are refused"

In June 2012 NSW Information Commissioner Deidre O'Donnell stated "As Information Commissioner I welcome goal 31 of the state plan and its confirmation of the objectives of the *Government Information (Public Access) Act* (GIPA Act). Goal 31 of the state plan calls for improved government transparency by increasing access to government information The goal highlights the community's right to openness, accountability and transparency in government decision-making and information. Greater public access to government information fosters collaboration, increases efficiency and builds a public sector that values and shares information."

It is crystal clear that the Government intends that all government agencies should go to great lengths to find ways to <u>assist</u> the public in accessing information and should refrain from going to any unreasonable lengths to <u>prevent</u> the public from accessing information

THE PUBLIC NEEDS TO BE ABLE TO ASK FOR AND RECEIVE, PERTINENT, ACCURATE, AFFORDABLE (IF NOT FREE) AND TIMELY ANSWERS TO STRAIGHTFORWARD REQUESTS FOR INFORMATION WHICH ARE GENUINELY BELIEVED TO BE IN THE PUBLIC INTEREST

Much of the administrative costs caused to government/agencies when the public attempts to get access to information occurs by refusal to make sought after information available proactively promptly and at lowest cost without the need for formal applications, and gaming the system by putting applicants through the run around. A major reason for this reluctance to accept and implement change and improvement in access to information is that releasing information goes against the natural instincts of government. The GIPA legislation creates a fundamental and significant change and conflict of interests for government and senior public officials. On the one hand, they have a duty to implement the legislation in accordance with its terms and spirit. However, ICAC has shown that implementing the legislation will quite often have a serious and occasionally damaging impact on their personal and political interests." Implementing the legislation is paramount in the public interest

The Government Information(Public Access) Act No 52:- 2009

USING GIPA TO REIN IN THE LOBBYISTS AND OTHER WHEELER DEALERS and to provide greater access to information and empower the public to be an informed army of scrutineers of all the wheeling and dealing that occurs in the myriad nooks and crannies of government agencies that are used by lobbyists and others

In November 2010 ICAC in a report on lobbying raised the issue of the lack of transparency in the current NSW regulatory system, describing it as

" a major corruption risk, and contributes significantly to public distrust. Those who lobby may be entitled to private communications with the people that they lobby, but they are not entitled to secret communications. The public is entitled to know that lobbying is occurring, to ascertain who is involved and, in the absence of any overriding public interest against disclosure, to know what occurred during the lobbying activity."

Other corruption risks cited in the report were inadequate record keeping, involvement with political fund raising, gifts and benefits, difficulty of access to information, former public officials acting as lobbyists, exploitation of privileged access and payment of success fees. ICAC recommended widening the registration requirement to cover all third party lobbyists and "Lobbying Entities" including industry associations, trade unions, employer groups, religious and charitable organisations, and corporations that employ staff or have board members who lobby on their behalf; *requiring those in government who are lobbied to create records of the lobbying activity, and for those records to then be accessible to the public as "open access information" under the GIPA act, for which there is no overriding public interest against disclosure*; and a new role for an independent government entity, such as the NSW Information Commissioner, to monitor the scheme and impose sanctions on lobbyists where necessary.

Empowering the public by access to information

Knowledge is power. Access to government information is the pathway to public knowledge.

How do we get access to government information?

We all know that lobbyists and others do their wheeling and dealing about all manner of matters in confidence and secret before getting agencies and councils to submit "suitable reports". These reports are then discussed and decided at confidential meetings of the agencies and local councils.

Government Agencies and Local Councils are invariably "The Consenting Authority"

How can the public gain access to information discussed in this covert wheeling and dealing and, at the same time, increase the integrity of governance and reduce/prevent mistakes maladministration malpractice wrongdoing iniquity and corruption being hidden under the cloak of confidentiality?

GIPA gives the public legal rights to access information at minimum cost and effort.

New System of Governance under The Government Information(Public Access) Act No 52

At the time of legislation, the NSW Parliament "recognised that GIPA and the digital revolution means government can never be the same again. We must enlist these Web 2.0 technologies in the cause of democracy and freedom. And that means changing the way we do business. First, it means greater openness**. And that in turn means governments have to overcome old habits of secrecy and control**"

GIPA provides a new way to ensure that government information, which is actually in the public interest, is not classified as confidential and discussed under the cloak of confidentiality and secrecy.

The GIPA Act legislates a changed focus strongly in favour of disclosure and places the onus on government agencies (including councils) to apply the prescribed public interest test before any information can be classified and treated as confidential. The onus lies with the agencies to apply the test impartially and accurately before making a decision to withhold any information

Use GIPA to empower the public to be an informed army of scrutineers of all the wheeling and dealing that occurs in the myriad nooks and crannies of government agencies that are used by lobbyists and others.

Needed improvements and assistance to the Office of the Information Commissioner

First: Restore funding to The Office of Information Commissioner to replace the reduction of staff from 33 to 25 last year which made it impossible to do the job for which it was legislated in 2009.

Second: Provide adequate funding for necessary additional staff/resources to increase the efficiency and effectiveness of the operation of the OIC

Third: Legislate prosecutory mandatory or otherwise power to enable the OIC to enforce its Final Decisions

Fourth: Support the Information Commissioner with the task of an accelerated advertising/education program to ensure the public has sufficient trust in you and your government to use GIPA effectively.

NEW SYSTEM OF GOVERNANCE UNDER THE GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009 No52

Consider a new system of governance, under GIPA. which provides for "the proactive public release of Government (council) information" and "giving members of the public an enforceable right to access Government (council) information" and that "access to Government (council) information is restricted only when there is an overriding public interest against disclosure" and prescribes a "public interest test" to establish whether any information can be classified and restricted as being confidential

Consider that some necessary exemptions do apply BUT IF AND ONLY IF the relevant information can be shown proactively (prima facie consideration) that it should be regarded as confidential AND has had the public interest test applied which shows clearly that the public consideration against disclosure outweighs the public consideration in favour of disclosure. The onus is on council to complete this process

Consider that council has an obligation TO ASSIST in every way reasonably possible and NOT TO RESIST, unreasonably, public attempts to gain access to council information

Consider THE OBJECT OF the GIPA ACT is **" In order to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective"** (see Parts 1 and 2, Divisions 1,2,3 and Schedule 1 of the Government Information (Public Access) Act 2009 No 52}

GIPA introduces an entirely new way for providing public access to government information and focuses the legislative onus in favour of the release of government information by consideration of the public's best interest.

In this respect in 2009 The NSW Parliament " recognised that GIPA and the digital revolution means government can never be the same again. We must enlist these Web 2.0 technologies in the cause of democracy and freedom. And that means changing the way we do business. First, it means greater openness. And that in turn means governments have to overcome old habits of secrecy and control"

The GIPA Act-Section 11 overrides secrecy provisions in other legislation."This Act overrides a provision of any other Act or statutory rule that prohibits the disclosure of information (whether or not the prohibition is subject to specified qualifications or exceptions), other than a provision of a law listed in Schedule 1 as an overriding secrecy law"

In October 2013 the DLG Confirmed the following about regulations for closed meetings of councils

"I confirm the Division's advice to you dated 17 May 2013 and 28 June 2013 that closed council meetings and the public's right to access information considered at a closed meeting is regulated under the Government Information (Public Access) Act 2009."

Councils must ensure a decision to classify any information as confidential or close a meeting complies fully with GIPA's legislated focus and onus

THE LONG JOURNEY TO ACCESS INFORMATION

THE PUBLIC NEEDS TO BE ABLE TO ASK FOR AND RECEIVE, PERTINENT, ACCURATE, AFFORDABLE AND TIMELY ANSWERS TO STRAIGHTFORWARD REQUESTS FOR INFORMATION WHICH ARE IN THE PUBLIC INTEREST.

At the November 2011 Australian Public Sector Anti Corruption Conference (APSAC) in Fremantle, Antony Pedroza (Senior Corruption Prevention Officer-Local Government and Planning) of ICAC NSW presented a paper titled "Beyond Wollongong".

That paper examines corruption prevention in local government beyond the Wollongong investigations, the lessons councils should learn from it, and looks at why similar corruption issues continue to arise.

On 28 July 2009, prior to attending a controversial "strategy conference" at Lilianfels in Katoomba, every member of "The Elected Council" received by email a similar, more focused, report detailing the lessons to be learned from the ICAC Wollongong Report that were specific to Blacktown City Council.

Protracted internal attempts to find out and resolve matters arising out of this and other reports (such as an email on 7 September 2009 concerning membership of the Internal Audit Committee and various reports about maladministration of the Council Animal Services Unit, and other Departments) failed.

Because of formal complaints which had been lodged against the Mayor, The General Manager and other senior officials, a meeting was arranged with The Mayor, The General Manager, Council's Solicitor David Baird, Denys Clarke and mutually agreed observers on 8 December 2009.

This meeting asked for and agreed to consider, favourably, a list of "desired outcomes" requested from Denys Clarke.

On 9 December 2009 David Baird confirmed in writing "Council acknowledges receipt of your 'desired outcomes'" and "We look forward to resolving this issue in a manner that satisfies all involved parties".

A further meeting was held with The General Manager and Denys Clarke on 25 March 2010 which was "minuted fully". No further progress, indeed regression, was made.

After months without any follow up action or contact on 11 July 2010, Mr Clarke wrote to the Council Solicitor asking about the current status of "resolving the issue in a manner that satisfies all parties"

On 13 July 2010 The General Manager emailed Mr Clarke "Good afternoon Mr Clarke. Thank you for copying me in on your email. I write to advise that I consider this matter to be an administrative one and therefore have instructed Mr Baird not to reply". This was confirmed by letter posted on 11August 2010.

This unilateral abuse of power negated the purpose and wasted the considerable resources and related legal fees used in arranging these meetings.

On 16 August 2010 Mr Clarke emailed The General Manager "Thank you for your letter advising me of your administrative decision. It is wrong, but it relieves me of the burden of my self imposed desire for resolution internally and empowers me to go to the ADT, and beyond if necessary."

In September 2010 Mr Clarke discussed the right to know with the new Office of the Information Commissioner and was encouraged to attend a full explanatory meeting with OIC staff.

On 27 October 2010 Mr Clarke attended an "Information Roadshow" conducted by the Office of the Information Commissioner at the RSL Club in Blacktown and asked the question "is the performance of the general manager of a local council a matter of public interest". The answer was "yes".

It was explained why the public had a right to know, in the public interest, whether Councillors were aware of and complied with their obligations when recruiting, appointing, oversighting, reviewing and reappointing a general manager to establish suitability for employment as General Manager.

On 9 November 2010 Mr Clarke lodged a Formal Access Application to Blacktown City Council for information concerning "The performance of the General Manager and the methodology/process by which Councillors monitor and assess it prior to presenting a report to the community through Council" and "my email to all members of 'The Elected Council' on 28 July 2009 and the ADT decision 233 on 30 September 2010 are relevant". Hard copies of the email and attachments thereto were included with and formed part of the Formal Access Application.

On 15 November 2010 I (Denys Clarke) received acknowledgement of this application in which Council stated "It is believed that the information you seek is of interest to the general public".

On 7 December 2010 I received Council's "Notice of Decision (s.58 of the GIPA Act)" refusing me access to all, but provided part only, of the requested information. I regarded it as being unsatisfactory.

So, on 7 January 2011 I wrote to the OIC requesting a "Review of Formal Access Application to and Response by Blacktown City Council" and asked the OIC to review the "Notice of Decision from Blacktown City Council dated 7-12-2010"

On 11 January 2011 the OIC acknowledged my request for review.

On 11, 12 and 13 January 2011 the community and The Elected Council were made aware of articles in the Blacktown Sun, "Former Director critical of Council", "Blacktown Council accused of 'maladministration' and cover-up", and "State Government guidelines questioned as Councillors debate audit committee"

On 25 April 2011 I arranged delivery to all Councillors of The Elected Council of two pages of relevant information about inappropriate administrative and decision making problems at Blacktown Council.

On 26 April 2011, I rang the OIC about the long delay in completing my requested review, then emailed confirmation that "it is accepted that knowing how the General Manager performs is in the public interest" and clarifying what I wanted from the review.

On 27 July 2011 I received a Provisional Review from OIC.

It recommended that "there is not an overriding public interest against the disclosure of the information requested and in the absence of an overriding public interest the information should be released to the applicant"

I rang the OIC to discuss procedure from then on. I was disappointed I would not be given access to Council's response to the Provisional Review as I was happy for them to know of mine. I had to wait for the OIC's decision after considering Council's response.

On 2 August 2011 I emailed the OIC confirming my concern that it had overlooked some information which I believed should be supplied to me.

On 7 September 2011 I received "10-165 – Final report on Review under section 89 of the Government Information (Public Access) Act 2009".

The Final Report recommended that "pursuant to section 94 of the GIPA Act, the Information Commissioner recommends against the agency's decision that there is an overriding public interest against disclosure of the information requested by the applicant and, pursuant to section 93 of the GIPA Act, the Information Commissioner recommends that the Agency make a new decision by way of internal review within fifteen working days of the date of this report" (Note this would be by 29 September 2011)

On Monday 12 September 2011 I emailed Ron Moore (General Manager). cc Craig Dalli, Ken Marsh and all members of The Elected Council with my comments on the Final Report 10-165 and my request/application for Internal Review.
There was no acknowledgement or contact of any kind in response to my email until on 28 September 2011 I received two emails from Craig Dalli.
The first one was sent at 2.51 pm saying "I confirm that an internal review on this matter is being carried out as per the recommendation of the OIC in their Final Report.
I anticipate that the review will be completed by Friday 21 September 2011
The Review will be carried out in accordance with the relevant legislation and guidelines.
Craig Dalli"
The second one was sent at 3.14 pm saying "Further to my earlier email. It meant to say completion of the review by 21 October not September. Apologies. Craig Dalli"
On 21 October 2011 I received Council's "Notice of Internal Review Decision. Reference is made to your application for an Internal Review under Section 86 of the GIPA ACT"
This response still refused to accept the OIC's recommendation, twice confirmed, that "the information should be released to the applicant" and refused to release the information requested.
So, In view of the above, inter alia, on 15 November 2011 I lodged an Application for Review of a Reviewable Decision with the ADT together with accompanying documents (in total 98 pages).
On 7 December 2011 Council resolved to "endorse the engaging of legal representatives to assist with defending the matter in the Administrative Decisions Tribunal" and "estimated costs for defending the matter be up to $12000". This escalated, eventually, to $40000.
At a Planning Meeting with The Deputy President of the ADT, Mrs Sigrid Higgens, on 17 January 2012, Orders were issued that the respondent (Council) file and serve all applications and decisions by 20 January 2012, the respondent file and serve its written statements and submissions by 6 February 2012, the applicant (Denys Clarke) and the OIC submit written statements and submissions by 17 February 2012, and a Planning Meeting be held on 21 February 2012."
The Council (Respondent) failed to comply with these orders and tried to manipulate a new delayed timetable to suit which disadvantaged the applicant. This was unacceptable to the applicant because of personal and health problems which had been put off to enable compliance with the original orders and could not be put off anymore. The applicant offered an alternative timetable to enable all parties to comply with the orders. The respondent (Counci) refused to agree.
At the Planning Meeting on 21 February it was agreed (albeit under protest by the applicant) and new Orders were issued that "the respondent file and serve its written statements by 27 February 2012, the OIC file and serve its written statements and submissions by 14 March 2012 and that the applicant to advise his further progress at a Planning Meeting on 17 April 2012"
The OIC "filed and served" a copy of its submission to me, two weeks late, by an email on 2 April 2012.
At this time The OIC withdrew its assistance from the case.
At the Planning Meeting on 17 April the Council sought and was granted further time to provide additional information. Despite strong protest from the applicant new Orders were issued that "on or before 1st May the respondent to inform in writing to the applicant any material provided to the General Manager to the 2009/2010 Performance Review Committee; on or before 1st May the respondent to file and serve any additional evidence and submissions in regard to information in Report No AD 300030; on 28 May the applicant to file and serve any material in reply. A Planning meeting to be held at 1.30 pm on Tuesday 5 June"
On 3 May I rang Council's solicitor enquiring when the submission due on 1st May would be forthcoming. She did not know and it turned out, subsequently, that she had to seek an extension from the ADT, which was granted, because Mr Dalli had taken annual leave not leaving instructions to enable compliance with the Orders.
This caused me severe inconvenience and disadvantage so I objected and complained to the ADT.

On 7 May Council's solicitor emailed me the "any additional evidence and submissions" but failed to comply with the remainder of the Order. Instead she advised "I confirm our client is confirming whether your email to Councillors was considered by the performance review committee and we will write to you the position as soon as possible"

On 8 May I emailed Council's solicitor that "the applicable Order was 'On or before 1st May the respondent to inform in writing to the applicant any material provided to the General Manager to the 2009/2010 Performance Review Committee'.

The underlining is mine so that you can be sure no option exists for your client to decide what material to provide to comply with the Order.

You will recall I was insistent that I would not accept anybody's word on the matter and required in writing what was provided.

It is not a matter for decision by your client because whether my email on 28 July 2009 (and others) has been considered, and how, has become part only of the 'any material' ordered to be provided to me in writing by Mrs Higgins. Please inform your client accordingly."

At the planning meeting on 6 June 2012 the respondent (Council) had not complied with this Order but did admit that the email of 28 July 2009 was part of the "any material" covered by the applicable Order and was not taken into consideration in the performance review of the General Manager.

On the morning of day one at the ADT hearing on 16 July 2012 the council released 11 pages of information similar to that contained in published material including annual reports.

Monday, February 25, 2013

Tribunal rules against council's bid to keep the lid on manager's performance.

In a decision that is sure to attract attention in the local government sector and perhaps beyond, NSW Administrative Decisions Tribunal Deputy President Higgins in Clarke v Blacktown City Council [2013] NSWADT 36 found there was no overriding public interest that prevented disclosure of most of a council report on the performance assessment of the council's general manager.

The council tried at every step for over two years to withhold what it argued was sensitive information in the report submitted to the full council in September 2010.

I represented Mr Clarke in the later stages of the ADT review including with written submissions and appeared for him in the hearing before Deputy President Higgins. With his permission this commentary draws more broadly on the applicant's experience than is the case with usual observations about court, tribunal and commissioner decisions.)

Deputy President Higgins ordered disclosure of withheld information consisting of

- two paragraphs in the report containing the assessment and overall rating of the general manager's performance by the review panel;
- the strategic objectives against which the general manager was assessed;
- and the general manager's self assessment of performance against each of these previously confidential objectives.

The council has 28 days to appeal the decision and has not yet released the documents.

It remains to be seen what if anything was worth the effort and expense.

The Tribunal decided in favour of the council on only one category of information in dispute: the review panel's assessment of the general manager's performance against each of the objectives. Deputy President Higgins said there was a strong public interest in disclosure of this information [80] but decided disclosure on balance was contrary to the public interest on personal information and "provided in confidence" grounds.

Significance

The decision is not a precedent that marks the end of confidentiality as a necessary element in the performance review process, or for the disclosure of information of a highly personal nature about a public servant.

Deputy President Higgins and along the way, the Office of Information Commissioner NSW, decided the public interest required disclosure of information about the performance of the general manager in carrying out the public duties set out in the Local Government Act and in acting to deliver on the council's priorities, goals and plans that should also be disclosed. Despite council claims withheld information was all personal information and other harms to the public interest would result from disclosure including at one stage a risk to someone of harm or serious harassment or intimidation.

Background

The applicant, Mr Clarke is a former councillor, and an activist, advocate and self-described altruist in his endeavours for greater accountability and transparency in the local area. He is 85 years of age.

Mr Clarke's application under the NSW GIPA act in November 2010 sought access to the report submitted to the council by the councillors that had conducted the review, and for documents concerning the way the review had been conducted. His interest was sparked when two months before the required review of performance took place, the council renewed the general manager's contract for five years. The report had been submitted to a closed session of the council. Little detail was reported publicly.

Delay
Apart from obfuscation, Mr Clarke endured delay at every step of the way.

It took eight months for the Office of Information Commissioner NSW to issue a ruling in his favour after he took the matter there in January 2011. The council then made a new decision basically maintaining its previous position. When Mr Clarke took that decision to the ADT, another eight months passed before a hearing, with council dragging things out whenever the chance arose. After the matter was heard in July 2012, the decision was reserved for seven months.

This is not the promised and necessary speedy access to independent review.

The time line illustrates the persistence needed when an applicant is faced with agency resistance to disclosure, particularly when the information in question is information the boss doesn't want disclosed, and where it has available funds to employ lawyers who can argue the toss about GIPA in this case, Sparke Helmore.

The council stared down the Office of Information Commissioner.

Inconsequential parts of the report and attachments were released at various points.

Eighteen months in, on the morning of the first day of the ADT hearing, 11 pages of information from the report were put on the table. The information was similar to information contained in the council's 2009 and 2010 annual reports.

Deputy President Higgins' decision two years and three months since it all began now requires more.

Cost
According to Mr Clarke, Blacktown City Council has spent something of the order of $40,000 on this so far and hundreds of hours of staff time seeking to protect information about the performance review from disclosure. The Local Government and Shires Associations also sprung into action to assist, inviting other NSW councils to contribute to the cost of defending Blacktown's decision in the Tribunal. One example from Leichhardt Municipal Council (pdf) although the $162 on the line there wouldn't help defray costs much at all. Ratepayers in Blacktown and elsewhere should be asking questions.

In addition, NSW taxpayers have also footed a sizeable bill but unquantified bill for the hours, days, weeks and months spent on the case by the Office of Information Commissioner and the ADT. As for Mr Clarke's time, he's an altruist.

Broader concerns

Mr Clarke's doubts about the thoroughness of the review process were confirmed when council was unable to locate any relevant documents that guided the councillors involved in undertaking the review other than the pro-forma, a questionnaire provided by a consultant engaged to assist and Mr Moore's self assessment. The Division of Local Government recommends training for this task, and along with the ICAC publishes guidance regarding managing performance and corruption and other risks. The council apparently provided none of this to the councillors involved.

Public interest

Two relevant extracts from the decisions concerning the public interest in disclosure are worthy of wide dissemination:

The Office of Information Commissioner 7 September 2011:

54.....Mr Moore is engaged in the exercise of public functions and is a representative of the agency. He has been reappointed to the position of General Manager for a further five-year term, which strengthens the public interest in favour of the release of information that accounts for that decision and demonstrates that he is performing at the required standard.

55. While there are considerations against disclosure that apply to the information requested by the applicant, the Information Commissioner is not satisfied that they are strong enough to outweigh the presumption and further considerations in favour of disclosure. The Information Commissioner recommends that there is no overriding public interest against disclosure of this information and that the information should be disclosed to the applicant.

Deputy President Higgins [71] 12 February 2013:

"In my view, there is a ..public interest in having sufficient information to scrutinise the statutory functions being performed by a general manager of a local government, as that position is one of considerable power and influence in the manner in which a local government operates and exercises its functions (for example, its service, regulatory, administrative and revenue functions). That is, information about the statutory functions being performed by the general manager and what methods and processes are used by the elected Council Members to monitor and assess those functions will enhance local government accountability."

In passing, Blacktown City Council engaged in another expensive but largely unsuccessful effort leading to this Tribunal decision in 2011 to prevent disclosure of a lengthy confidential report into irregularities involving an employee and a contractor. Michael McKinnon of the Seven Network pursued that one.

Aspects of the decision rankle with Mr Clarke particularly the Tribunal's interpretation of his application and the reasonableness finding regarding the council's search for

relevant information. Not surprisingly, he is moving on with another cause. Blacktown needs more like him.

Timeline:

9 November 2010 - Clarke application to Council.

7 December 2010 - Council decision-disclosure of part report and attachments, refusal of access to substantive material concerning criteria and performance.

10 January 2011 - review application lodged with Office of Information Commissioner.

7 September 2011 - OIC Final Report. Recommends against Council decision to refuse access. No evidence for claim that disclosure "would expose a person to a risk of harm or serious harassment or serious intimidation." Public interest in disclosure overrides other consideration against disclosure.

21 October 2011-new Council decision following OIC recommendation-further partial disclosure. Refusal of access to substantive material concerning criteria and performance.

November 2011 - review application lodged in ADT.

January 2012 - first of three planning meetings. Deadlines set often passed without compliance by council. Council submissions cite public interest considerations against disclosure- all are subject to a public interest test.

GIPA Section 14 - Item 1(d) - prejudice the supply of confidential information,
Item 1(g) - disclosure of information provided to the agency in confidence
Item 1(h) - prejudice the effectiveness of a review conducted by the respondent
Item 3(a) - personal information
Item 6 - secrecy provisions

16-17 July 2012 - ADT hearing. On the morning of day one the council released 11 pages of information similar to that contained in published material including annual reports.

12 February 2013-ADT decision. Tribunal finds two of five considerations, *prejudice the supply of confidential information, and prejudice the effectiveness of a review conducted by the agency* are of no relevance. Where considerations against disclosure are relevant they are overriden in all but one category by the public interest in disclosure. Council ordered to disclose [77-83] the assessment and overall rating of the general manager's performance by the review panel, the strategic objectives against which the general manager was assessed, and the general manager's self - assessment of performance against each objective.

……