Review of the Government Information (Public Access) Act 2009

Submission to the Department of Justice

August 2014

Sydney2030/Green/Global/Connected
city of villages

CITY OF SYDNEY 2030

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Introduction

This submission responds to the NSW Attorney General's review of the *Government Information (Public Access) Act 2009* (**GIPA Act**) pursuant to section 130 of the Act. The City of Sydney notes that the purpose of the review is to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

The City of Sydney supports the objectives of the GIPA Act and considers that these objectives remain valid. While most of the terms of the Act remain appropriate for securing the objectives of the Act, the City considers that the operational impact of certain parts of the Act is placing increased pressure on the capabilities and resources of agencies, particularly within the local government sector. In this regard, the City of Sydney has recently seen an increasing trend in formal applications by law firms and other corporate entities seeking information as part of 'fishing expeditions' for potential legal claims, or as an alternative to Court-ordered discovery, rather than as a result of a genuine interest in the transparent governance of the City.

The City considers that the right balance needs to be struck between facilitating access to government information and imposing unreasonable burdens on public sector agencies, which detract from the primary functions of an agency.

Key Recommendations

The City recommends in relation to the GIPA Act:

1. **The application fee and processing charges for formal access applications should be indexed or subject to periodic increases to ensure that the charges imposed remain reasonable, but not to an extent that it excludes some members of the community.**

2. **Reasonable charges for informal applications should be allowed under the Act.**

3. **Agencies should be authorised to charge the reasonable costs of copying documents which are provided to access applicants in response to informal and formal applications.**

4. **A deemed refusal to deal with an application under section 63 of the GIPA Act should not operate to prevent the agency from charging an application fee or for the processing time it has taken, if government information is released after the prescribed timeframe.**

5. **Guidelines should be prepared in relation to what constitutes an "unreasonable and substantial diversion of the agency's resources" for the purposes of section 60(1)(a) of the Act. These guidelines should have regard to, and be consistent with the NSW Ombudsman's Practice Manual on Unreasonable Complainant Conduct.**

6. **The requirements for when an agency is required to consult with a person under section 54 of the GIPA Act should be clarified, either by way of amendment or by guidelines.**

7. **Section 54 of the GIPA Act should be amended to specify that if an agency has not received a response from a person with whom the agency is required to consult within a specified period of time (such as 7 days), the agency is entitled to proceed to determine the access application on the basis that the person does not object to the release of the information.**

8. **Sub-section 54(7) should be amended to clarify the review rights to which the sub-section is referring to.**

9. **Clarification or further guidance in relation to access applications which seek access to CCTV footage under the GIPA Act should be provided.**

10. **Consideration should be given to removing clause 4 of Schedule 1 of the *Government Information (Public Access) Regulation 2009* (GIPA Regulation) which prescribes that 'approvals, orders and other documents' are additional open access information for local authorities, or alternatively, the obligation that this information be displayed on a local authority's website be removed.**

11. **A "material variation" to a government contract should be defined in the GIPA Act, or alternatively, guidelines on what amounts to a "material variation" should be prepared.**

12. **Consistent terminology should be adopted in relation to the use of the terms 'applicant' and 'access applicant' under the Act.**

Detailed Recommendations for the Review of the Government Information (Public Access) Act 2009

Processing Costs and Charges

The City acknowledges that it is the intention of Parliament, as specified in section 3(2) of the GIPA Act, that the discretions conferred by the Act be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information. However, the City considers that the following matters require clarification and/or amendment under the Act:

- processing charges for access applications;
- copying charges; and
- no processing charges for access applications decided outside timeframe.

Processing Charges for Access Applications

Presently, section 41 of the GIPA Act requires any formal application lodged to be accompanied by a $30 flat fee, with section 64 allowing the City to impose a processing charge for dealing with an access application at a rate of $30 per hour for each hour of processing time for the application. The City notes that these fees are modest and do not cover the actual cost of responding to an access application. Such fees and processing charges ought to be indexed or subject to periodic increases to ensure that the charges imposed remain reasonable. Any increase in charges should not act to exclude sections of the community.

There is no guidance provided by the legislation as to whether it is appropriate for the City to charge for processing informal requests. Pursuant to section 8(2) of the GIPA Act, the release of government information in response to an informal request may be subject to any reasonable conditions that the agency thinks fit to impose. It is uncertain whether the imposition of conditions requiring the payment of processing charges and photocopying would be considered reasonable.

The City considers that permitting charges for informal applications is reasonable and should be allowed under the GIPA Act due to the time and resources required to be redirected towards the processing of an informal application. A considerable disincentive is created for agencies to accept informal applications where processing charges for informal applications are disallowed. In such a scenario, agencies may become more likely to refuse to accept informal applications and instead encourage applicants towards lodging formal applications so as to preserve the ability to recover a portion of the agency's costs. Such an outcome would appear contrary to the objectives on the GIPA Act.

The application fee and processing charges for formal access applications should be indexed or subject to periodic increases to ensure that the charges imposed remain reasonable, but not to an extent that it excludes some members of the community.

(Recommendation 1)

Reasonable charges for informal applications should be allowed under the GIPA Act.

(Recommendation 2)

Copying Charges

The GIPA Act does not clearly identify the circumstances when an agency can charge fees for copying documents released under the GIPA Act.

The GIPA Act and Regulation prescribe that an agency may charge 'the reasonable cost of photocopying' for open access information, so long as the agency has already made the information available for inspection in a way that is free of charge.[1] An agency may also proactively release government information either free of charge or at the 'lowest reasonable cost to the agency'.[2] The City does not see any reason why different terminology regarding costs has been used in relation to open access information ('reasonable cost of photocopying') compared with additional information proactively released by an agency ('lowest reasonable cost to the agency').

The Act is silent on whether the reasonable cost of copying may be charged in relation to the provision of documents in response to informal and formal access applications. The City is aware of the IPC's factsheet dated June 2014 titled GIPA Act fees and charges and note that this factsheet provides:

> Where the information is requested is open access information, or additional information that has been released proactively, agencies may charge as provided for in sections 6 and 7 of the GIPA Act. However, where other information is released in response to an informal request, there is no authority in section 8 of the GIPA Act to impose charges.

The City considers that this position needs to be clarified. As discussed above, section 8(2) enables an agency to release government information in response to an informal request subject to any reasonable conditions that the agency thinks fit to impose. In the City's view, a reasonable condition may include the payment of the costs of copying the documents requested.

Whilst the GIPA Act prescribes an application fee and processing charge for formal access applications, this processing charge is calculated based on the amount of time it has taken an agency to respond to an access application. Therefore, it is arguable that this processing charge does not cover the photocopying cost where an access applicant requests that he or she be provided with copies of the information requested.

The City is aware of the IPC's *Guideline 2: Discounting Charges*, which has been prepared pursuant to sections 12(3) and 14(3) of the Act and which agencies are required to have regard to, in accordance with section 15(b) of the Act. Whilst not strictly on the subject of discounting charges, this Guideline relevantly states the following at paragraph 1.7 in relation to the costs which the IPC considers to be covered by the processing charge:

[1] GIPA Act, section 6(3); GIPA Regulation, clause 4(1).
[2] GIPA Act, section 7(2).

> The IPC's view is that agencies cannot charge for registering the application, conversations with the applicant to clarify the request or reduce the scope, drafting file notes, drafting letters (including notification of a valid application, or advance deposit letters; however the determination letter can be charged for), postage, internal conversations, printing and other general administration incidental to or associated with processing the application.

The City considers that the IPC's view is not consistent with the definition of *processing time* contained in section 64(2) of the Act. In circumstances where agencies are required to provide access to information in the manner requested by the applicant (unless certain prescribed factors exist)[3], the City also considers that it is reasonable for agencies to charge copying costs where access is required by providing a copy of a record of the information. The GIPA Act should expressly authorise agencies to charge reasonable costs of copying documents which are provided to access applicants in response to informal and formal applications. Allowing agencies to charge reasonable costs of copying documents will also encourage access applicants to give further consideration to voluminous applications.

Agencies should be authorised to charge the reasonable costs of copying documents which are provided to access applicants in response to informal and formal applications.
(Recommendation 3)

Timeframes

The City of Sydney is concerned that the decision period of 20 working days contained in section 57 of the GIPA Act is insufficient, particularly in instances where an access application requires the lengthy diversion of the City's resources. Many of the access applications received by the City require consultation with another person or agency and/or searches of archives and volumes of information, each of which entitles the City to an extension period of up to 10 days (up to a maximum of 15 days for both). Where an access application is voluminous or requires extensive searches of the City's archives, the City has found that the timeframe can be too short in duration. In particular, the City has found that the timeframe leaves little or no time for the drafting of notices of decision and redaction where required.

The City acknowledges that the decision period can be extended by agreement with the access applicant. However, in some circumstances the City has experienced difficulties in obtaining agreement from applicants for an extension of the decision period. This results in the City being unable to decide an application within the specified decision period and therefore be in breach of its obligations under the GIPA Act.

The City understands the policy intent behind the deemed refusal provision in section 63 of the GIPA Act, if the access application is not determined within the prescribed timeframe, and supports the applicant's right to have the access application reviewed after this timeframe. However, the disqualification of the City charging processing fees and charges where it fails to determine an application within time, creates an incentive for applicants to request voluminous amounts of information when lodging an access application and not to agree to extensions of time so as to force a public sector agency

[3] GIPA Act, section 72.

into a position where the access application is not decided within time and thereby resulting in the processing fees and charges being waived.

The City suggests that section 63 should be amended in order to discourage the practice of applicants deliberately requesting irrelevant information and refusing to grant agencies extensions of time, and in order to reduce the wastage of agency resources. The City supports the position that a deemed refusal to deal with an application gives rise to a right of review under Part 5 of the Act, but does not consider that a deemed refusal should also operate to prevent the agency from charging an application fee or for the processing time it has taken, if government information is released after the prescribed timeframe.

A deemed refusal to deal with an application under section 63 of the GIPA Act should not operate to prevent the agency from charging an application fee or for the processing time it has taken, if government information is released after the prescribed timeframe.
(Recommendation 4)

Unmeritorious Applicants and 'Fishing Expeditions'

The City of Sydney has recently seen an increasing trend in formal access applications:

- by law firms and other corporate entities seeking information as part of 'fishing expeditions' for potential legal claims, or as an alternative to a subpoena or Court-ordered discovery; and
- by members of the public who appear to believe it is their public duty to repeatedly question and/or challenge decisions of the City, often in respect of matters in which they have no obvious interest.

Though the City supports the objective of the GIPA Act to give members of the public a right to access government information, these types of applications result in the City expending and diverting considerable costs and resources towards the processing of their access applications.

The City acknowledges that, pursuant to section 110 of the GIPA Act, an agency may apply to NCAT for a restraint order against a person who makes more than three unmeritorious access applications to one or more agencies within a two year period. However, the City contemplates that the scope of the circumstances in which a restraint order may be sought by an agency is quite narrow in practice.

The City is also aware that it may refuse to deal with an access application if dealing with the application would require an unreasonable and substantial diversion of the agency's resources.[4] However, the City acknowledges that it is a larger local council and may have more resources available to it than other, smaller local government authorities. At present it is unclear whether an access application which would constitute an "unreasonable and substantial diversion of the agency's resources" for a small public sector agency such as a small rural council would still be considered to be so were it lodged with City of Sydney. To date, the City's practice has been to deal with access applications irrespective of the diversion of resources required to process the application. The City has also not yet sought a section 110 restraint order against unmeritorious

[4] GIPA Act, s60(1)(a).

applicants due to concerns that NCAT would view the threshold of “unreasonable and substantial diversion of the agency’s resources” as being a higher threshold for the City of Sydney, than for other local government agencies. The City considers that agencies would be assisted by guidelines on section 60(1)(a) of the GIPA Act as to what constitutes an “unreasonable and substantial diversion of the agency’s resources”.

In this regard, the City is aware if the NSW Ombudsman's Practice Manual titled *Managing Unreasonable Complainant Conduct* (2nd ed: 2012), which is designed to assist organisations to manage interactions with complainants. This Practice Manual identifies that an early warning sign of unreasonable complainant conduct where the complainant has made a number of access to information requests on an issue.[5] The City recommends that guidelines in relation circumstances in which an access application may be considered to be an unreasonable and substantial diversion of the agency's resources be prepared which have regard to, and are consistent with, the NSW Ombudsman's Practice Manual on unreasonable complainant conduct.

Guidelines should be prepared in relation to what constitutes an “unreasonable and substantial diversion of the agency’s resources” for the purposes of section 60(1)(a) of the GIPA Act. These guidelines should have regard to, and be consistent with the NSW Ombudsman's Practice Manual on Unreasonable Complainant Conduct.

(Recommendation 5)

Consultation on Public Interest Considerations

The City supports the requirement under section 54 of the GIPA Act for agencies to consult with a person before providing access to information which relates to that person in response to an access application. The outcome of consultation assists the City to make a decision as to whether there is, or is not, an overriding public interest against the disclosure of the requested information.

However, the City has found the drafting of section 54 to be somewhat complex and unclear. In particular, the City notes that section 54(1) requires an agency to consult with a person "*if it appears that*" each of the following pre-conditions are met:

(a) the information is of a kind that requires consultation under this section; and

(b) the person may reasonably be expected to have concerns about the disclosure of this information; and

(c) those concerns may reasonable be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.

Whilst the requirement (a) is relatively straightforward for the City to determine by reference to subsection 54(2), requirements (b) and (c) require the City to consider the documents from the perspective of the person with whom the City is considering consulting with, prior to the consultation occurring. The City considers that these last two requirements could be clarified, either by way of amendment or by guidelines, in order to assist agencies to determine whether consultation is necessary.

[5] NSW Ombudsman, *Managing Unreasonable Complainant Conduct: Practice Manual* (2nd ed: 2012), pg 18.

Section 54(1) of the GIPA Act currently requires an agency to take "*such steps (if any) as are reasonably practicable*" to consult with a person before providing access to information relating to the person. The City also considers that this requirement could be clarified to identify:

- whether there is any obligation on an agency to follow up a person with whom the agency is required to consult after an initial consultation letter is sent, to determine whether that person has any objection; or

- whether, if a person does not respond to a consultation letter within a specified timeframe, it is reasonable for an agency to assume that the person has no objection to the release of the relevant information (i.e. can they person be deemed not to have objected?).

At present, the City has adopted a policy of following up a person with whom the City is required to consult in order to determine whether the person objects to the release of the information, prior to determining the access application. However, as raised in the third paragraph of the Timeframes section above, the City has experienced difficulties meeting the prescribed timeframe for determining access applications. The process of following up on third party consultations where no response has been received further increases the time it takes the City to determine the access application.

The City recommends that section 54 of the GIPA Act be amended to specify that if an agency has not received a response from a person with whom the agency is required to consult within a specified period of time (such as 7 days), the agency is entitled to proceed to determine the access application on the basis that the person does not object to the release of the information.

The City has also experienced difficulty interpreting sub-section 54(7) of the GIPA Act, which currently provides:

> Review rights on a decision are pending while the objector is entitled to apply for a review of the decision under Part 5 (ignoring any period that may be available by way of extension to apply for review), or any review duly applied for is pending.

The City acknowledges that this sub-section is designed to clarify sub-clause 54(6) which relevantly states that:

> …access is not to be provided until the agency has first given the objector notice of the agency's decision to provide access to the information and notice of the objector's right to have that decision reviewed, and is not to be **provided while review rights on the decision are pending. [emphasis added].**

It appears that sub-section 54(7) is providing a definition of the term 'review rights on the decision are pending' used in sub-section 54(6). If this is the case, the term should be identified accordingly. The City also considers that this sub-section should be clarified in the following respects;

- who's "review rights" are pending?

- what "decision" do these "review rights" relate to?

- is the "decision" mentioned on the first line of the sub-section the same "decision" mentioned on the second line of the sub-section?

The requirements for when an agency is required to consult with a person under section 54 of the GIPA Act should be clarified, either by way of amendment or by guidelines.

(Recommendation 6)

Section 54 of the GIPA Act should be amended to specify that if an agency has not received a response from a person with whom the agency is required to consult within a specified period of time (such as 7 days), the agency is entitled to proceed to determine the access application on the basis that the person does not object to the release of the information.

(Recommendation 7)

Sub-section 54(7) should be amended to clarify the review rights to which the sub-section is referring to.

(Recommendation 8)

Interplay between GIPA Act and PPIP Act

The City presently has a Closed Circuit TV system ('CCTV') installed within the CBD, which records data for the purpose of crime prevention. The CCTV would usually capture images of individuals and therefore be classified as "personal information" pursuant to both Schedule 4(4) of the GIPA Act and section 4 of *the Privacy and Personal Information Protection Act* 1998 ('PPIP Act'). In accordance with clause 9 of the *Privacy and Personal Information Protection Regulation* 2005, the City has an agreement with the NSW Police Force to disclose the CCTV images to the NSW Police Force for the purposes of crime prevention and detection.

During more recent months, the City has experienced a spike in the number of GIPA access applications from persons and law firms seeking to obtain CCTV footage. Presently, the City's approach has generally been to conclude that there is an overriding public interest against the disclosure this information as the images contain "personal information" and the number of anticipated privacy issues which are likely to arise as a result of making this type of data accessible to the public. The City has also encountered difficulties in complying with the public consultation requirements under the GIPA Act in relation to the CCTV footage, as the City is unable to identify the relevant persons in the footage to engage in consultation.

The City believes it would be assisted by clarification or further guidance on access applications that seek access to CCTV footage under the GIPA Act.

Clarification or further guidance on access applications that seek access to CCTV footage under the GIPA Act.

(Recommendation 9)

Additional Prescribed Open Access Information for Local Authorities

Clause 4 of Schedule 1 in the GIPA Regulation prescribes that "approvals, orders and other documents" held by a local authority are open access information, and hence in accordance with section 6 of the GIPA Act must be made publically available free of charge on a website maintained by that agency.

The City understands that there is presently widespread non-compliance with this requirement by local authorities due to the additional costs and resources that would be incurred in making all such information publically available.

Whilst the City is endeavouring to achieve full compliance with its obligations to disclose this information, it holds concerns with respect to the merit of this requirement, particularly with respect to the diverse range of applications for and approvals granted under Part 1 of Chapter 7 of the *Local Government Act* 1993. The City considers there is limited utility to the general public in providing these types of information. For example, short term approvals for busking have very limited public benefit once the personal information of the applicant is redacted from the document. Furthermore, it is the City's experience that there is little demonstrated interest by the public in obtaining information relating to these types of approvals.

The City acknowledges that it is willing to provide such information upon request, however, questions the need to expend resources on an ongoing basis to make such information available on its website when there appears to be negligible demand and utility in making such information publically available on the City's website.

Consideration be given to removing clause 4 of Schedule 1 of the GIPA Regulation which prescribes that 'approvals, orders and other documents' are additional open access information for local authorities, or alternatively, that the obligation that this information be displayed on a local authority's website be removed.
(Recommendation 10)

Government Contracts Register

Material Variations

There is no definition of "material variation" to a contract included within section 33 of the GIPA Act. Consequently, the City of Sydney understands that many agencies have created arbitrary or inconsistent thresholds for the variations which they disclose on their websites. The City submits that to ensure consistency in reporting disclosures and to promote compliance with the legislation, agencies would benefit from there being a stipulated minimum percentage or degree of variation which constitutes a "material variation".

A "material variation" to a government contract should be defined in the GIPA Act, or alternatively, Guidelines on what amounts to a "material variation" should be prepared.
(Recommendation 11)

Copy of Class 3 Contracts on Register

The City acknowledges and endeavours to comply with the obligation for copies of all class 3 contracts to be included in the City's government contracts register. However, the City notes that the size of a number of the class 3 contracts makes it very difficult for these contracts to be uploaded and displayed on the City's website, as required by section 35(2) of the GIPA Act.

Inconsistent Terminology – access applicant v applicant

The interpretive provisions in Schedule 4 of the GIPA Act define 'access applicant' to mean 'the applicant under an access application'. This defined term however only appears in a total of 6 different provisions within the Act.[6] A far greater number of provisions in the Act instead use to term 'applicant', which is not defined in Schedule 4 of the GIPA Act.

To date, the City's approach has been to interpret 'applicant' in the same way as 'access applicant'. However, the City considers that, for the purposes of clarity, it would be beneficial to adopt consistent terminology throughout the entire Act and Regulation.

Consistent terminology should be adopted in relation to the use of 'applicant' and 'access applicant' under the Act.

(Recommendation 12)

Copyright

The City has experienced some difficulties in resolving the tension between the disclosure obligations imposed on it by section 6 of the GIPA Act and the restrictions contained in the *Copyright Act* 1968 (Cth). This issue has been of particular concern with respect to ensuring copyright is not infringed in relation to development application plans and other documents lodged with the City and which are required to be disclosed under Schedule 1 of the GIPA Regulation. The policy objectives of the GIPA Act are, in practice, limited by the operation of the Copyright Act.

The City acknowledges the IPC has provided knowledge updates to assist local authorities to balance the competing requirements of the GIPA Act and the Copyright Act. The City also acknowledges the Australian Law Reform Commission's Report Copyright and the Digital Economy, tabled in Parliament in February 2014, which recommends 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.

However, until such time as this recommendation of adopted, or the requirements of open access information under the GIPA Act are amended, the City continues to experience practical difficulties in reconciling its obligations under the GIPA Act and the Copyright Act.

[6] See sections 55, 56, 77, 83, 89 and 110 of the GIPA Act.