



information
and privacy
commission
new south wales

Own motion investigation report Manly Council

Review of Manly Council's compliance with the *Government Information
(Public Access) Act 2009*

7 August 2013



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Executive summary

Under section 6(2) of the *Government Information (Public Access) Act 2009* (**GIPA Act**), local councils must publish development application information on their websites, unless to do so would impose unreasonable additional costs.

In January 2012, Manly Council removed most development application (DA) information from its website. Between October 2011 and April 2012, the Information Commissioner received four complaints about the ways in which Manly Council allegedly restricted public access to DA material. These complaints raised concerns about the Council's compliance with its obligations under the GIPA Act and the *Government Information (Public Access) Regulation 2009* (**GIPA Regulation**).

In March 2012, the Information Commissioner, under section 21 of the *Government Information (Information Commissioner) Act 2009* (**GIIC Act**), commenced an investigation into whether the Council was meeting its open access obligations under the GIPA Act for publishing DA material.

In May 2013, the Information and Privacy Commission (IPC) provided the Council with a provisional report which outlined its provisional findings and recommendations with respect to its investigation. The Council provided submissions in response to the provisional report. Those submissions were considered by the Information Commissioner in compiling this final report.

The IPC notes the efforts and co-operation of the Council during its investigation and the steps it has taken to actively consider its obligations under the GIPA Act.

This report addresses the issues surrounding the publishing of open access information.

Summary of findings and recommendations

Recommendations

1. The Council place all electronic DA information held on its website as soon as practicable, except for those matters exempt under Schedule 1 Clause 3(2) of the GIPA Regulation. The information previously published on the Council's website prior to January 2012, should be restored. The Council is to provide a timetable on how this is to be achieved within one month of the date of this report.
2. The Council should place a notice on its website which outlines how the open access information that is not available on its website can be accessed.
3. The Council update its *Information about Submissions* fact sheet to be consistent with the *DA Information – The Notification and Submissions Process: Frequently Asked Questions* fact sheet, which states that submissions, confidential or otherwise are not confidential during the public participation process under the *Environmental Protection and Assessment Act 1979 (EPA Act)* or if an access application is made under the GIPA Act and access is granted.
4. The IPC is unable to locate the Council's record of open access information that it does not make publically available on the basis of an overriding public interest against disclosure. The Council should publish its record as soon as practicable.
5. The Council amend its disclaimer to advise that DA information is available for inspection.
6. The Council's consideration of its copying charges should include a review of the current charges and removal of the copying charges it imposes for providing photocopies in response to a formal access application.
7. The Council amend its Guidelines to remove the distinctions associated with Councillors making applications for information. The Information Commissioner suggests that Manly Council, consider a Councillor's application (including in what capacity it is made) in the usual way under the GIPA Act with reference to section 55 as appropriate.
8. The Council review its GIPA Guidelines (June 2010) and its GIPA Fact Sheet to incorporate the changes or clarifications suggested.

Observations

9. The Information Commissioner's knowledge updates: *Copyright and the GIPA Act* and *Copyright and compliance with the GIPA Act – FAQs for local councils* remain current and are the Information Commissioner's published guidance on the issue.
10. The Information Commissioner will continue to monitor the impact of the Copyright Act on Councils' GIPA Act obligations and the progress of the Australian Law Reform Commission (ALRC) inquiry and will provide updates on the IPC's website on any developments as they arise.
11. The Council has advised the IPC that it will revise its copying charges for providing copies of open access information.

Investigation: purpose and process

Outline of investigation powers of the Information Commissioner

Under section 17 of the GIPA Act, the Information Commissioner's role includes:

- promoting the object of the GIPA Act;
- providing information, advice, assistance and training to agencies about the GIPA Act;
- assisting agencies in connection with the exercise of their functions under the GIPA Act; and
- monitoring, auditing and reporting on the exercise by agencies of their functions under, and compliance with, the GIPA Act.

Section 21 of the GIIC Act empowers the Information Commissioner to conduct investigations into how a particular agency exercises its functions under the GIPA Act. These investigations are known as own motion investigations.

Section 23(1) of the GIPA Act provides that such an investigation should be made in the absence of the public.

Section 15 of the GIIC Act entitles the Information Commissioner to:

- a. act in an informal manner (as far as possible);
- b. determine the procedures to be followed in conducting an investigation; and
- c. inform herself on any matter in any way that the Commissioner considers to be just.

The procedures for conducting investigations are set out in section 23 of the GIIC Act and include giving the subject of the investigation an opportunity to provide submissions.

Division 4 of the GIIC Act sets out the Information Commissioner's powers in an investigation, including to:

- a. require information (section 25); and
- b. enter and inspect any premises occupied or used by an agency, and inspect any record or thing on the premises (section 26).

In line with the Information Commissioner's functions, the aim of investigating an agency is to identify what systems, policies and practices the agency has in place in order to exercise its functions under the GIPA Act, and assist agencies to meet its obligations under that Act.

Why did we investigate?

Between October 2011 and April 2012, the IPC received four complaints:

- (a) about the way in which Manly Council (the **Council**) makes Development Application (**DA**) information available to the public, and
- (b) that the Council removed DA information from its website.

In January 2012, the Council removed most DA information (including documents received in connection with a proposed development) from its website, other than the DA information that must be published during the public exhibition period under the EPA Act. The Council says that it did so as a temporary measure to ensure compliance with the GIPA Act.

The removal of DA information from the Council's website and whether this complied with the GIPA Act was reported on in the media. This report and the investigation process is a means by which the IPC can provide clarification and guidance on the release of DA information.

The Council submitted to the IPC, and stated in the media¹, that it had decided to remove DA information from its website in order to comply with directions made by the Information Commissioner, citing:

- IPC Knowledge Updates:
 - *Copyright and Compliance with the GIPA Act* (March 2012);
 - *Copyright and Compliance with the GIPA Act – FAQs for Local Councils* (May 2011); and
- *IPC Guideline 3: Local councils – personal information contained in development applications: what should not be put on council websites* (May 2011).

Council also cited privacy and copyright laws.

After dealing with the complaints, the IPC decided to investigate the Council's open access information practices in respect of DA material.

Scope of investigation

In March 2012, the Information Commissioner, under section 21 of the GIIC Act, commenced an investigation into whether the Council was meeting its open access information obligations under section 6 of the GIPA Act for publishing DA information.

Specifically, the investigation looked at the Council's systems, policies and practices for making open access information available, with a particular emphasis on DA information.

How did the IPC investigate?

On 28 March 2012, the Information Commissioner notified the Council of her decision to investigate and report on the exercise of its functions under the GIPA Act, as required by section 22 of the GIIC Act. The Information Commissioner advised Council that the primary focus of the investigation was on the Council's systems, policies and practices for releasing open access information under the GIPA Act and GIPA Regulation.

In conducting the investigation the IPC:

- reviewed the Council's website to examine what DA information is published;
- reviewed the following documents:
 - Manly Council, Access to Information: GIPA Guidelines – June 2013;
 - Manly Council, Access to Information: (GIPA) Procedures – June 2010;
 - Manly Council, Access to Information Policy – 30 April 2012; and
 - Manly Council's informal and formal access request forms.
- met with and interviewed relevant Council officers;
- requested and received submissions and ancillary documents from the Council, including
 - the Council's estimate of costs to publish DA information online;
 - a schedule itemising all access requests it had received from January 2012 to 27 April 2012; and
 - Internal and external legal advice the Council received in respect of making DA information publicly available.

The IPC also monitored the Council's website and the Agenda and Minutes of its Ordinary Meetings in order to understand the Council's decisions on making DA information publicly available.

¹ *Manly DA details to be hidden*, Manly Daily, 28 March 2012; *Council privacy ruling is wrong*, Manly Daily, 19 April 2012

Open access information

The GIPA Act

The GIPA Act (which replaced the *Freedom of Information Act 1989 (FOI Act)*) commenced on 1 July 2010.

The aim of the GIPA Act is to advance a system of responsible and representative democratic government that is open, accountable, fair and effective. The object of the GIPA Act, outlined in section 3 of the Act, is to open government information to the public by:

- authorising and encouraging the proactive release of government information by agencies;
- giving members of the public an enforceable right to access government information; and
- providing that access to government information is restricted only when there is an overriding public interest against disclosure.

The GIPA Act confers both obligations and discretions on agencies regarding the release of government information. Under section 6, agencies must make government information that is open access information publically available, free of charge. Agencies must do so by publishing a range of open access information on its website, unless to do so would impose an unreasonable cost on the agency, or there is an overriding public interest against disclosure.

Mandatory proactive release of open access information

The mandatory public release of open access information under the GIPA Act promotes consistent and transparent information sharing practices across NSW agencies, as well as providing members of the public with an immediate right of access to important government information. Members of the public should not need to apply for open access information from an agency.

In line with the objects of the GIPA Act², the mandatory release of open access information helps to foster responsible and representative government that is open, accountable, fair and effective. It does this by placing the onus on agencies to put information in the public domain, thereby:

- promoting open discussion of public affairs, enhancing government accountability and contributing to the positive and informed debate on issues of public importance
- informing the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public, and
- ensuring effective oversight of the expenditure of public funds.

What is open access information?

Section 18 of the GIPA Act sets out what types of information constitutes open access information. Open access information includes:

- (a) the agency's information guide;
- (b) information about the agency contained in any document tabled in parliament;
- (c) the agency's policy documents;
- (d) the agency's disclosure log of access applications;
- (e) the agency's register of government contracts;
- (f) the agency's record of the open access information, if any, that it does not make publically available on the basis of an overriding public interest against disclosure; and

² section 3 of the GIPA Act

- (g) any other government information prescribed by the GIPA Regulation as open access information.

For local councils, the GIPA Regulation lists the additional open access information that councils must make available on their websites, and for inspection and copying at council offices, including information about DAs.

Clause 3(1) of Schedule 1 to the GIPA Regulations deals specifically with DAs and states:

Information contained in the following records (whenever created) is prescribed as open access information:

- (a) development applications and any associated documents received in relation to a proposed development including the following:
 - (i) home warranty insurance documents,
 - (ii) construction certificates,
 - (iii) occupation certificates,
 - (iv) structural certification documents,
 - (v) town planner reports,
 - (vi) submissions received on development applications,
 - (vii) heritage consultant reports,
 - (viii) tree inspection consultant reports,
 - (ix) acoustics consultant reports,
 - (x) land contamination consultant reports,
- (b) records of decisions on development applications (including decisions made on appeal),

Clause 3(2) of Schedule 1 to the GIPA Regulation excludes from that information, insofar as it consists of:

- (a) the plans and specifications for any residential parts of a proposed building, other than plans that merely show its height and its external configuration in relation to the site on which it is proposed to be erected, or
- (b) commercial information, if the information would be likely to prejudice the commercial position of the person who supplied it or to reveal a trade secret.

This requirement to provide access to this information and allow copies to be made was previously contained in section 12 of the *Local Government Act 1993* (NSW), which was repealed and replaced by the GIPA Act on 1 July 2010. The only new requirement imposed by the GIPA Act in this regard is the requirement to make the information available on council's website.

What does the EPA Act require?

Whilst the IPC does not regulate the EPA Act, as part of this investigation it was necessary to consider the provisions of the EPA Act regarding DAs and what requirements the EPA Act places on the Council.

Section 79 of the EPA Act sets out the public participation process of developments, which includes a requirement for the Council to, as soon as practical after a DA application is made, place the application and any accompanying information on public exhibition for a period of not less than 30 days.

The EPA Act also contains an indemnity for people using documents for the purposes of that Act against any claim for breach of copyright³. With respect to a development application, it is the applicant that provides the indemnity.

³ Section 158A of the EPA Act

DA information on the Council's website

Prior to January 2012, the Council published on its website DA information dating back to 2004/2005.

In January 2012, the Council decided to remove most DA information from its website, apart from the DA information that it is required to make available during the public participation period under the EPA Act.

Upon expiry of the public participation period, the Council's information technology systems would automatically remove DA information from its website. This included names of DA applicants, DA forms, and any documents submitted by applicants in connection with a development proposal.

Currently, some DA information for which the submission period under the EPA Act has expired, remains published on the Council's website, such as a list of the key documents submitted in relation to the DA, a chronology of what documents were submitted and if relevant, when decisions regarding that DA were made. However, some of the actual documents have been removed.

With respect to this information, the Council publishes the following notice:

*"Some documents are not available. These include applications lodged before 1/1/2012, documents subject to privacy laws and copyright documents following determination. You can apply to view these documents in person at Council by completing and submitting a **Development Application Access Request Form**"*

The Council's website has determinations dating back to June 2012 on its website, subject to the above disclaimer.

Reasons for removal of DA information

The Council submitted to the IPC that it decided to remove DA information from its website because the Council would:

- a. incur unreasonable costs if it were to publish all DA information (whenever created) that it holds;
- b. be in breach of the *Privacy and Personal Information Protection Act 1998 (PPIP Act)*; and
- c. be in breach of copyright legislation.

This report will address each of these matters in turn below.

Unreasonable additional costs

In conducting this investigation, the IPC asked the Council whether it had identified any cost differential in publishing open access information on its website as opposed to making this information available for viewing at its office.

During an initial attendance at the Council's Chambers on 1 May 2012, the Council provided the IPC with a memorandum dated 26 April 2012 titled "*Estimate of cost to publish open access information online – DA information whenever created*" (the Memorandum). The Memorandum contained detailed information about, but not limited to:

- a. the estimated number of DA files held by the Council;
- b. the estimated number of pages of DA information held by the Council;
- c. the Council's process for uploading DA information onto its website pre- and post- 2004; and
- d. the costs associated with uploading all DA information held by the Council on its website.

In its Memorandum, the Council submitted that:

“...the cost of uploading all DA Information, whenever created, would cost Manly Council approximately \$3,071,350...

...to upload DA information **whenever created** would **impose unreasonable additional costs on Council**”. [Council’s emphasis]

The Council also explained that:

“Prior to 2004, DA information was, and is still, kept in hardcopy. Each of the pages of the hardcopy files of the DA Information would need to be scanned, redacted and uploaded into TRIM.

Council began scanning and loading DA Information on the Electronic Document Management System (**EDMS**) – Authority around 2004. From 1 January 2012 Council began using a new EMS – TRIM. This DA Information will need to be reviewed and new records containing the redacted information stored into TRIM”.

The IPC understands that the Council’s estimate of \$3,071,350 is calculated on the basis of having to publish approximately 4,912,620 pages of DA information dating back to 1955.

On 1 May 2012, the Council provided the IPC with a schedule of the access requests it received for the period 1 January 2012 to 30 April 2012. The IPC observed that the majority of requests were for open access information. The Council’s submission on costs did not account for the costs associated with processing such access requests on a daily basis.

The IPC also understands that as at 1 May 2012:

- a. Two full-time staff were responsible for entering DA information into its electronic system and were appropriately trained to do so;
- b. The Council required that applicants provide it with an electronic version of the DA (including the application form, and supporting DA information); and
- c. The Council required an applicant to complete a Development Application and Checklist (that contains the personal details of the applicant, including name, email, telephone number) and a web version of this form.

It is important that the Council comply with its obligations under the GIPA Act to make open access information including DA information publically available free of charge. Where to do so would impose additional costs on the agency, the GIPA Act says that such information should be made available in any other way that the agency considers appropriate.

The Council has stated in its memo that the costs associated with complying would impose unreasonable additional costs on the Council and proposed that the Council should place DA information online as such information is entered into its system.

The IPC acknowledges that publishing all DA information that the Council holds (dating back to 1955) is a large project that would require additional resources and incur significant costs.

However, until January 2012, the Council had DA information dating back to 2004 published on its website, although it notes that only a small amount of electronic information is held from 2004. From 2007, it required DA plans to be submitted electronically and therefore holds more electronic DA information from 2007.

From 2007, DAs have been submitted with a “web version” that does not contain personal information. This is the version that is uploaded on Council’s website during the public participation period. As a result, it would not appear that there is substantial additional work required to upload these documents, although the Information Commissioner acknowledges that personal information in these records may need to be redacted.

The Information Commissioner recommends that the Council place all electronic DA information held on its website as soon as practicable, except for those matters exempt under Schedule 1 Clause 3(2) of the GIPA Regulation. The information that was previously published on the Council's website prior to January 2012, should be restored.

The Council should provide the IPC with a timetable how this will be achieved. The timetable should be provided to the IPC within 1 month of the date of this report.

The Council should also place a notice on its website which outlines how the open access information that is not available on its website can be accessed.

Privacy

The Council has expressed concerns about publishing personal information contained in DAs and related documents online, particularly in respect of the submissions (or objections) it receives in relation to DAs under the EPA Act.

In the course of this investigation, the Council told the IPC that by publishing personal information contained in the DA application and related documentation (such as submissions on DAs), it would be in breach of the PPIP Act, namely that it would contravene an Information Protection Principle (IPP).

As part of the Council's DA process, notification letters are sent to interested people who are invited to make a submission on the DA, either in writing or via its website.

The PPIP Act (and the IPPs) set out the legal obligations that NSW government agencies (including statutory bodies and local councils) must comply with when they handle personal information.

IPP 11⁴ limits the circumstances in which agencies may disclose personal information. However, section 25 of the PPIP Act exempts an agency's compliance with the restriction imposed by IPP 11 if another Act requires or permits non-compliance. For example, the EPA Act requires DA information to be published during the public participation period.

In order to comply with the PPIP Act, local councils should take steps to notify individuals of the types of personal information submitted as part of DAs that will be made publicly available and the way in which that information will be available.

As set out in the Information Commissioner's Guideline 3, certain personal information contained in and related to DAs should be published online in order to give context to the decision being made, to promote transparency in decision-making, and to help identify potential conflicts of interest.

However, the Guideline provides that it is not in the general public interest to publish the following personal information:

- personal contact details, such as phone numbers or email addresses;
- signatures;
- personal financial information (e.g. credit card details);
- photos depicting people; and
- health and medical information.

Submissions on DA applications and the Public Interest Test

When considering personal information, the Council takes into account submissions lodged with respect to DAs, including where the party lodging submissions requests that they remain confidential.

Item 7 of the Council's *Information About Submissions* (October 2011) information sheet states:

If you consider that all or part of your submission contains information that should remain confidential, the onus is on you to advise Council accordingly by including the word "Confidential" in your submission title. Please be aware that submissions marked confidential cannot remain confidential if the application proceeds to the Court. Comments of a personal defamatory nature should be excluded and Council accepts no responsibility in this regard. In making a submission, you do so at your own risk. [Council's emphasis]

The Council's information sheet *DA Information – The Notification and Submissions Process: Frequently Asked Questions* (November 2012), advises as follows:

⁴ section 18 of the PPIP Act

Unless specifically advised to the contrary, all submissions received are treated as public documents and may be viewed by the applicant and any other interested parties whilst on Public Exhibition or by making Application under the Government Information (Public Access) Act 2009 after the notification period expires. Submission letters are also accessible thru [sic] Council's Open File Policy and they may also be reproduced in whole or in part in Council reports and in Court proceedings.

For the purposes of the GIPA Regulation, submissions received on DAs constitute open access information, and should be made publicly available subject to any overriding public interest against disclosure.

In considering whether there is an overriding public interest against disclosure of submissions (or any other information requested under the GIPA Act) the Council must apply the public interest test⁵ to the information at issue. This requires the Council to:

- a. identify the public interest considerations in favour of disclosure;
- b. identify the public interest considerations against disclosure (listed in the table to section 14 of the GIPA Act); and
- c. determine the weight of the considerations for and against disclosure, and where the balance between those interests lie.

Having applied the public interest test, if the Council decides that there is an overriding public interest against disclosure of some of the information contained in submissions on DAs (such as personal information), or any other information submitted in connection with a DA, the Council should consider section 6(4) of the GIPA Act, which requires Council to facilitate access by redacting that part of a document over which it claims that there is an overriding public interest against disclosure.

The statements in the Council's facts sheets, outlined above, are inconsistent with the provisions of the GIPA Act to the extent that they inform people that if they request that their submission remain confidential, then it will do so with the exception of the matter proceeding to Court.

The Information Commissioner recommends that the Council update its *Information about Submissions* fact sheet to be consistent with the *DA Information – The Notification and Submissions Process: Frequently Asked Questions* fact sheet, which states that submissions, confidential or otherwise are not confidential during the public participation process under the EPA Act or if an access application is made under the GIPA Act and access is granted.

Record of Open Access Information

The GIPA Act requires an agency to keep a record of any open access information that it does not make publicly available on the basis of an overriding public interest against disclosure⁶.

Section 18(f) of the GIPA Act requires the Council to publish the record on its website

The IPC has been unable to locate such a record on the Council's website. The Information Commissioner recommends that the Council publish its record as soon as is practicable.

⁵ section 13 of the GIPA Act

⁶ Section 6(5) of the GIPA Act and Schedule 1, clause 3(1)(c) of the GIPA Regulations

Copyright

The Council has expressed to the IPC its concerns regarding maintaining access to plans and diagrams, that are part of a DA, online after the expiration of the EPA Act's public participation period.

For plans and diagrams that the Council does not publish online, the following notice appears:

*Some documents are not available. These include applications lodged before 1/1/2012, documents subject to privacy laws and copyright documents following determination. You can apply to view these documents in person at Council by completing and submitting a **Development Application Access Request Form***

Subject to receiving a general request for DA information, the Council provides view-only access to information subject to copyright.

The GIPA Act expressly provides⁷ that none of the requirements relating to mandatory proactive release of certain government information or in the GIPA Regulation requires or permits an agency to make open access information available in any way that would constitute an infringement of copyright.

Acknowledging the tension between the GIPA Act and the Copyright Act, the Information Commissioner sought legal advice about copyright as it relates to making open access information publicly available. This advice formed the basis of two knowledge updates published by the Information Commissioner: *Copyright and the GIPA Act* and *Copyright and compliance with the GIPA Act – FAQs for local councils*.

The content of these knowledge updates remains current, although the IPC notes the work of the ALRC on the subject, which is discussed in more detail below.

In the knowledge updates the IPC has explained that copyright does not prevent people from looking at the information, but affects the manner and form in which access is provided.

DA information that may be subject to copyright includes, but is not limited to:

- architectural plans and drawings;
- specialist reports;
- surveys;
- landscape design plans and drawings.

By making such information available in the manner in which it does, the Information Commissioner is satisfied that the Council is complying with its obligations under the GIPA Act. In considering future requests for access to information that may be subject to copyright, the Council should have regard to the Information Commissioner's published guidance.

The Information Commissioner notes that in December 2012, the EPA Act was amended to confirm that an indemnity exists for those people using such documents for the purposes of the EPA Act⁸. In the case of a DA, it is the applicant that provides the indemnity. In the Information Commissioner's view, this amendment does not lessen the open access obligations outlined in the GIPA Act because the indemnity only applies for actions undertaken for the purposes of the EPA Act.

Developments in Copyright and the GIPA Act

The tensions between the GIPA Act and the *Copyright Act* 1968 are well known and are, in part, currently the subject of an inquiry by the ALRC. The Information Commissioner made a submission to

⁷ Section 6(6)

⁸ Section 158A

the ALRC in response to its Issues Paper: *Copyright and the Digital Economy*⁹. As a result of submissions (including the Information Commissioner's) received on the issue, the ALRC has recently published a discussion paper¹⁰ on issues including the current tensions between information access legislation and the Copyright Act. The ALRC discussion paper acknowledges the Information Commissioner's submissions and proposes (for discussion) amendments to the Copyright Act to address a number of issues, including the impact on local councils of the Copyright Act when complying with their obligations under information access legislation.

The Information Commissioner will continue to monitor this issue and the progress of the ALRC's inquiry and will provide updates on the IPC's website on any developments as they arise.

⁹ Issues Paper 42 – August 2012 <http://www.alrc.gov.au/publications/copyright-ip42>, specifically questions 33 and 34. The Information Commissioner's Submission can be found at <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy/submissions-received-alrc> - submission 209.

¹⁰ Discussion Paper 79, 6 June 2013 <http://www.alrc.gov.au/publications/copyright-and-digital-economy-dp-79>, chapter 14

Other ways the Council makes DA information available

The Council makes DA information that it does not publish online available in other ways.

Under section 4 of the GIPA Regulation, local councils must make open access information publicly available by:

- (a) making the information available for inspection free of charge by any person at council's office, and
- (b) providing a copy of the information (or providing copying facilities) to any person either free of charge or for a charge not exceeding the reasonable cost of photocopying.

The Council requires that members of the public seeking access to open access information (including DA information) which is not available on its website, complete and submit its Development Application Access Request Form.

Before access to DA information contained on Manly Council's website is granted, a 'Terms and Conditions' page appears, requiring the user to agree to, the following conditions:

General

If you access this web site you will be taken to have agreed to the following terms and conditions:

- The contents of this website (which includes downloadable material) are subject to copyright and are protected by laws in Australia and other countries through international treaties.
- Manly Council grants you a non-exclusive licence to produce the contents of this website in your web browser (and in cache file produced by your web browser) for the sole purpose of viewing the content. Manly Council reserves all other rights.
- To the maximum extent permitted by law, Manly Council excludes all liability to you for loss or damage of any kind (however, caused, including by negligence) arise from or relating in any way to the contents of this website and/or you use of it.
- All matters relating to this website are governed by the laws of the State of New South Wales, Australia.
- By accessing this information I request to do so pursuant to the *Government Information (Public Access) Act 2009* and I understand that Council is making the information available under the provisions of that section of the *Government Information (Public Access) Act 2009*. [sic]

Informal release

Section 8 of the GIPA Act enables an agency to release government information informally. There is a significant difference between information that agencies must make available by mandatory proactive release under section 6 of the GIPA Act, and an agency's discretion to informally release information, subject to any conditions that the agency thinks fit to impose, pursuant to section 8 of the GIPA Act.

Release under section 8 is by way of an informal process. The Council has a process, set out in its GIPA procedures, for dealing with such requests.

The Council has a form for general information requests and a form specifically for development information. During the course of the IPC's investigation, the Council updated its DA Access Request Form.

In response to receiving a DA Request Form, the Council identifies and locates the DA information requested and then decides by what means it will provide access to the information (view-only or copies).

Where a member of the public makes a broad request, or requests access to a DA file that involves a large volume of documentation, the Council either clarifies the scope of the request with the person making the request, or requests that the scope of the request be reduced / limited.

The GIPA Act does not provide guidance regarding the procedure to be followed by an agency in dealing with an informal request for release of information. However, the IPC notes the process that the Council has in place for dealing with such informal requests.

The Information Commissioner recommends that the Council amend its disclaimer to advise that DA information is available for inspection.

Photocopying Charges – Informal and Formal access requests

Under section 4(1)(b) of the Regulation, a local council may impose copying charges for DA information (open access information) only if it has made this information available in one other way that is free of charge. However, copying charges may not exceed the reasonable cost of photocopying. The GIPA Act does not define ‘reasonable cost’, nor does it set an amount that may be charged for photocopying.

Council’s DA Request Form states:

“If photocopying charges apply. Refer to Council’s Fees & Charges.”

The photocopying charges imposed by Manly Council are outlined in its *Schedule of Fees & Charges 2012 / 2013* as follows:

	(Ex. GST)	(Incl. GST)
A4 black & white (per copy)	\$1.82	\$2.00
A3 black & white (per copy)	\$2.73	\$3.00
A4 colour (per copy)	\$4.55	\$5.00
A3 colour (per copy)	\$7.27	\$8.00
Additional labour cost for larger runs involving collating & stapling (per hour)	\$36.36	\$40.00
Copying of Plans - First copy	\$31.82	\$35.00
Copying of Plans - Additional pages/copies	\$13.64	\$15.00

The requirements under the GIPA Regulation means that if the DA information is not available on the Council’s website, then it must be made free of charge. It is important to note that the Council, in those circumstances cannot charge for access unless the information is also available free of charge.

The Council’s formal access application form also sets out its charges for providing photocopies of documents. The IPC’s *Guideline 2: Discounting charges – special benefit to the public generally* states that agencies may only charge for the amount of time it takes an agency to deal efficiently with a formal access application, and 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 may be charged for), postage, internal conversations, [printing and other general administration incidental to or associated with processing the application].¹¹

The Council has advised the IPC that it will revise its copying charges for providing copies of open access information.

The Information Commissioner recommends that the Council’s review include a review of the current charges and removal of the copying charges it imposes for providing photocopies in response to a formal access application.

¹¹ Part 1 of the IPC’s *Guideline 2: Discounting charges – special benefit to the public generally*

Actions taken by the Council since the commencement of this investigation

Since the commencement of this investigation, the IPC has monitored the Council's website in respect of the DA information published. The IPC also reviewed the Council's monthly Minutes of its Ordinary Meetings in order to follow any decisions the Council made in respect of publishing its DA information online.

At its June 2012 Ordinary Meeting¹², the Council resolved as follows:

1. Council review its current method of providing open access to Development Applications and other related documents outside the 'exhibition period' on Council website. Such access should be in accordance with the general principles of the Government Information (Public Access) NSW Act 2009 (GIPA) which includes 'a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure'.
2. Council review the type of information relating to Development Applications that can remain on the Council website for permanent public access and historical reference.
3. Council request applicants provide the information required by Council to assess their application in an electronic format that is not subject to copyright and will conform with the Privacy Legislation in addition to the more detailed plans and reports required that can remain 'on file' but only made available to the public via a formal GIPA request.
4. Council consider the permanent publication of reports and decision on DAs on the Council website.
5. When provided, Council make public the advice given by the Information Commissioner during a meeting held in May 2012 at Manly Council regarding access to current and historical Development Application information on the Manly Council website.

The Information Commissioner appreciates the priority that the Council has given to dealing with this issue. However, the IPC is unaware of the content of the specific advice from May 2012 that the Council seeks to make public. The Information Commissioner's approach to the issue of open access information, and specifically DA information is contained in the Guideline 3, which is available on the IPC website.

At its November 2012 Ordinary Meeting, the Council resolved that its General Manager provide to its councillors a copy of the legal advice/s he had received in relation to permanent access to development information on the Council's website and present a report on how the Council could resolve this issue.¹³

The General Manager's report¹⁴ stated:

Manly Council automatically removes all personal information from submissions before they are placed online; confidential submissions are treated as personal information and are not placed online....

¹² Resolution No. 113/12, Manly Council Minutes of its Ordinary Meeting held at Council Chambers on Monday 4 June 2012, page 27

¹³ Manly Council Minutes of its Ordinary Meeting held at Council Chambers on Monday 12 November 2012: Resolution No. 191/12

¹⁴ General Managers Division Report No.13: Development Application Information available on Council websites

Manly Council has attempted to comply with the GIPA Act and provide as much DA information to the public as possible while complying with the competing, and inconsistent, requirements of copyright and privacy legislation.

Manly Council is working towards providing historical DA information online from 2007...The publication of historical DA information online requires extensive computer programming and manual checking of all information before they can be placed online.

The General Manager's report also contained a table of the type of information that a selection of councils, including the Council, make available online. The table below is a summary as it relates to the Council and as it appeared in the report:

DA Document Type	Manly Council
Application Form	Online Permanent
Plans or drawings	Online Temporary
Internal layouts of residential buildings	Not Online
Reports submitted with the DA	Online Permanent
Submissions	Online Permanent
Planner's Report	Online Permanent
Minutes of Determining Committee	Online Permanent
Notice of Determination	Online Permanent

The Council's guidelines, procedures, and policy documents for making information available under the GIPA Act

The IPC requested and received copies of the Council's current guidelines, policies and procedures related to the exercise of its functions under the GIPA Act.

Since this investigation commenced, the Council has actively reviewed its GIPA documents with respect to compliance with the GIPA Act.

The IPC notes that the Council has also placed a link to the IPC website on its Access to Information (GIPA) page on its own website.

Manly Council, Access to Information: GIPA Guidelines – June 2013

The Council recently updated its GIPA Guidelines in June 2013. The previous version was dated June 2010.

The current version has some positive differences from the previous version and the Information Commissioner supports the Council's decision to regularly review and update such documents.

The Guidelines set out the procedure for a Councillor seeking access to information under GIPA in their capacity as a Councillor as opposed to in their personal capacity. There is a separate form that Councillors need to complete in order to make their request. The Council explains in the Guidelines that this distinction is to enable it to understand the capacity in which the individual is making the request.

While we can appreciate from the Council's point of view that it is important to understand whether a request is made by a Councillor in that capacity, the GIPA Act makes no distinction between an individual making a request for information in a professional or personal capacity. Such factors are to be considered by agencies under section 55 of the GIPA Act as part of its assessment of the public interest considerations rather than as outlined by the Council in its Guidelines.

To the extent that the Guidelines impose requirements or conditions on requests made by Councillors in that capacity, those requirements are beyond the scope of the GIPA Act and seeks to impose additional obligations.

The Information Commissioner recommends that the Council amend its Guidelines to remove the distinctions associated with Councillors making applications for information. The Information Commissioner suggests that the Council consider a Councillor's application (regardless of in what capacity it is made) in the usual way under the GIPA Act with reference to section 55 as appropriate.

Manly Council, Access to Information: (GIPA) Procedures – June 2010

As a result of the Guidelines being updated, the IPC asked the Council, whether it had amended its other documents, including the GIPA Procedures. The Council advised that it was in the process of reviewing its Guidelines because they are out of date and the processes outlined in the Guidelines were not used by its staff. The Council confirmed that once its review of the Guidelines was complete, it would upload the Guidelines to its website.

Manly Council, Access to Information Policy

The Council's Access to Information Policy sets out the Council's obligations with respect to individual's seeking access to information held by the Council.

The Council recently updated its policy in June 2013. The Policy is consistent with the Council's obligations as set out in the GIPA Act.

Manly Council's Formal Access Application Form

During the IPC's investigation, the Council has updated its Access Application Form.

The Information Commissioner considers the changes made to the form to be appropriate and endorses the pro-active approach that the Council has taken to reviewing its GIPA resources.

Glossary

<i>Acronym or abbreviation</i>	<i>Explanation</i>
ALRC	Australian Law Reform Commission
the Council	Manly Council
DA	Development Application
EPA Act	<i>Environmental Planning and Assessment Act 1979</i>
GIIC Act	<i>Government Information (Information Commissioner) Act 2009</i>
GIPA Act	<i>Government Information (Public Access) Act 2009</i>
GIPA Regulation	<i>Government Information (Public Access) Regulation 2009</i>
IPC	Information and Privacy Commission (NSW)
IPPs	Information Privacy Principles
PPIP Act	<i>Privacy and Personal Information Protection Act 1998</i>
PPIP Regulation	<i>Privacy and Personal Information Protection Regulation 1998</i>

Summary of attachments

1. Letter from the Information Commissioner to Manly Council dated 28 March 2012.
2. Manly Council GIPA Guidelines – June 2013
3. Manly Council Access to Information Policy – 30 April 2012
4. Manly Council Access Request Forms