



information
and privacy
commission
new south wales

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31 March 2022

Mr Gary Kellar PSM
c/- Office of Local Government
Locked Bag 3015
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By email: olg@olg.nsw.gov.au

Dear Mr Kellar

SUBMISSION – COUNCILLOR CONDUCT ACCOUNTABILITY REVIEW

The Information and Privacy Commission (IPC) is pleased to provide a submission to the independent review of the effectiveness of the framework for dealing with councillor misconduct in NSW which is informed by the Consultation Paper *Councillor Conduct Accountability in NSW Local Government*.

The IPC oversees the operation of privacy and information access laws in New South Wales.

The Information Commissioner has responsibility for overseeing agency compliance with the information access rights enshrined in the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act) and exercises functions prescribed in the GIPA Act and the *Government Information (Information Commissioner) Act 2009* (NSW).

Model Code of Conduct – Open Access Requirements

The IPC has previously consulted with the Office of Local Government (OLG) in relation to the Model Code of Conduct for Local Councils in NSW (2020) and the Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW (2020). Through that consultation, the IPC identified section 6 of the GIPA Act and Schedule 1 of the GIPA Regulations, which specify that information in the returns of interests of councillors, designated persons and delegates is open access information that must be made publicly available unless there is an overriding public interest against disclosure.

The Model Code of Conduct for Local Councils in NSW (2020) acknowledges and addresses these open access information requirements, at [4.27]:

Information contained in returns made and lodged under clause 4.21 is to be made publicly available in accordance with the requirements of the Government Information (Public Access) Act 2009, the Government Information (Public Access) Regulation 2009 and any guidelines issued by the Information Commissioner.

To assist local councils in complying with these open access requirements, the Information Commissioner has issued Information Access Guideline 1, concerning the disclosure of information in returns of interests submitted by councillors and designated persons. Guideline 1 references the Model Code of Conduct for Local Councils and provides a comprehensive overview of the mandatory proactive disclosure and release requirements of local councils.

Complementary to Guideline 1, the OLG provided guidance to the local government sector on the matters to be considered by councils when identifying designated persons and the assessment councils should undertake. Collectively, Guideline 1 and the OLG guidance support Councils to achieve their responsibilities in the mandatory disclosure of returns. In July 2021, the IPC published a GIPA Compliance report following its audit of the Local Government Sector, which contains a range of recommendations, including the recommendation that councils should ensure that policies include a clear definition of 'designated persons' and a clear process for the publication, review and updating of returns.

Consultation Paper – Councillor Conduct Accountability in NSW Local Government

The Consultation Paper prepared for this review provides an overview of the existing framework for dealing with complaints about councillor misconduct and notes that serious breaches of a council's code of conduct may be referred to the OLG for further disciplinary action. The examples of serious breaches provided include pecuniary interest breaches, failure to disclose conflicts of interest arising from the receipt of political donations and breaches of the 'integrity provisions' of a council's codes of conduct (i.e., misuse of the code of conduct, reprisal action, disclosure of information about code of conduct matters and failure to comply with a council resolution).

However, the Consultation Paper is not clear as to whether failure to comply with open access information requirements under the GIPA Act relating to a councillor's returns of interests also constitutes a serious breach by the councillor of a council's code of conduct. The OLG should consider clarifying the responsibilities of councils and individual councillors to publish councillors' returns of interest. Ensuring that for the former, adequate procedures are in place to facilitate the publication of information, while for the latter, ensuring that the principle of personal responsibility is upheld.

The Information Commissioner is of the view that, in the context of significant regulatory engagement and application of regulatory resources, failure to comply with the open access information requirements relating to the publication of the returns of interests of councillors is a serious breach that may trigger a referral to the OLG for investigation. The OLG may wish to consider its referral powers, including whether it would be appropriate to refer incidents of non-compliance of a councillor or a council to the Information Commissioner.

The Information Commissioner has certain referral powers set out in section 33 of the GIIC Act which may be used when investigating a complaint against or relating to an agency, including a local council. The Information Commissioner may furnish information to another agency, such as the OLG, if satisfied that the information is relevant to the functions, policies, procedures, or practices of that other agency. Importantly, any disclosures must adhere to the *Privacy and Personal Information Protection Act 1998* (NSW) and *Health Records and Information Privacy Act 2002* (NSW), and not disclose personal information within the meaning of these Acts (s 33(2)(b) of the GIIC Act).

The Information Commissioner welcomes the opportunity to make a submission to the review.

Please do not hesitate to contact me if you require any further information. Alternatively, your officers can contact [REDACTED], Senior Policy Officer, Legal Counsel and Regulatory advice at [REDACTED].

Yours sincerely



Elizabeth Tydd
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Information Commissioner
NSW Open Data Advocate