



GIPA

What's in it for Local Government and its customers?

By Mitchell Morley

Since the amendments to section 12 of the Local Government Act (LGA) in 1998 many councils have struggled to provide public access to council information in a timely, transparent and consistent manner. The inconsistencies between the Freedom of Information Act (Fol), the Privacy and Personal Information Protection Act (PPIPA) and section 12 of the LGA have also made it difficult for members of the public to determine the best way to access council information. The introduction of the Government Information (Public Access) Act (GIPA) will, on face value, dramatically change the regime for public access to council information. But will this change be for the better for both councils and consumers or will it simply increase the level of confusion?

As usual, the answer will probably lie in the detail which will largely be contained in the various guidelines that the Act allows the Information Commissioner to issue. Whilst time will tell, it may be useful to make some early observations about whether the new Act is likely to improve things for the public and council staff alike.

Exemptions

Both the old Fol Act and s12 contained exemptions that were somewhat difficult to interpret and apply. For example the Fol Act contained 39 different grounds on which an agency could refuse access. GIPA takes a broader “principles” based approach to disclosure by introducing an overriding public interest test. The underlying principle of GIPA is that information should be disclosed unless there is an overriding public interest consideration not to.

Open Access

Under GIPA, agencies must make certain “Open Access Information” available free of charge. The open access information for councils is pretty much the same as the information previously listed in s12(1) of the LGA. One important change is that such information must be published on the council's web site. This may have

Implications for things like pecuniary interest declarations and development application documents.

Other Information

GIPA also provides that agencies may choose to make other information available as a matter of course and/or make other information available in response to an informal request. Whilst these provisions are designed to encourage proactive and informal disclosure, in the absence of any standard industry guidelines they are likely to be interpreted and applied very differently by councils.

Access Applications

For information which is not made publicly available, either formally or informally, an access application under GIPA is required. In determining access applications the overriding test is whether disclosure is in the public interest. Schedule 1 of the Act lists information for which it is to be conclusively presumed that there is an overriding public interest against disclosure. Such information includes, for example, documents:

- protected by secrecy laws
- subject to legal professional privilege
- dealing with the care and protection of children
- dealing with Aboriginal and environmental heritage

For information not listed in Schedule 1 there are 7 categories of public interest considerations that can be taken into account when determining whether there is a public interest against disclosure.

Whilst in some respects this simplifies the process the challenge for all agencies will be to weigh up often competing public interest considerations. This will continue to be a subjective process. GIPA allows the Information Commissioner to issue public interest consideration guidelines to assist agencies and hopefully these will be written in a way that provides some useful assistance for councils.

GIPA: What's in it for Local Government and its customers?

For Better or Worse

Perhaps the biggest problem for councils and consumers under the old regime was the confusion caused by the inconsistency between FoI, PPIPA and section 12. Members of the public, and at times even their legal representatives, were often confused about which avenue to use to obtain access. Similarly council staff were often unclear about the most appropriate process to follow. As a result significant differences in interpretation existed from council to council.

So will GIPA alleviate this problem? The good news is that GIPA replaces both the FoI Act and s12 of the LGA. So at the very least there will only be one regime for access to council information instead of two. This is a major improvement.

As far as the relationship between the new Act and PPIPA however, there is likely to still be some confusion. GIPA requires that an agency give consideration to PPIPA when considering whether it is in the public interest to disclose information. There is a public interest consideration against disclosure of information if disclosure could reasonably be expected to reveal an individual's personal information or contravene an information protection principle under PPIPA.

This will still present a key challenge to councils which possess huge amounts of personal information that is often intertwined with non personal information. Once again the key will be the Information Commissioner's public interest consideration guidelines.

Fees and Charges

Another major problem faced by councils under the old regime was the requirement under s12 that councils must allow inspection of their other documents "free of charge". This effectively prevented councils from recovering even a portion of the costs incurred in making access available. This also encouraged members of the public to make wide ranging and at times quite speculative applications. Following the introduction of s12(6) larger councils began receiving hundreds of applications every year and in many cases were forced to employ additional staff just to process s12 requests.

For information not routinely made available under GIPA a person must make a formal "access application".

This must be accompanied by an application fee of \$30. Agencies can also charge a processing fee of \$30/ hour. Thus the fees and charges regime in GIPA is very similar to the existing FoI regime with one interesting difference. Under FoI the quantum of fees and charges was established by order of the Minister published in the Government Gazette. Under GIPA the quantum of both the application fee and the processing charge is stated in the Act. This will make it more difficult for the amount to be altered. The \$30 fee is here to stay!

Whilst the ability for councils to recover some of the cost of processing applications under GIPA will be welcome relief, there is a catch. The provision in the FoI Act that prohibited charging a processing fee for the first 20 hours for access to a person's personal information remains in GIPA. This has in the past been a source of confusion for councils as many council files contain a combination of personal and non personal information. Whether or not an application relates to "personal information" can sometimes be difficult to determine.

Summary

The introduction of one piece of legislation governing access to council information is welcome. Similarly, a principles based approach which favours and encourages disclosure is likely to be a positive thing that will promote greater transparency and accountability. How easy it will be for councils and consumers to apply and work with will depend heavily on any guidelines issued by the Information Commissioner. The critical thing for local government will be to ensure that these guidelines adequately consider and address the peculiarities of the local government environment and are not written primarily with just state government agencies in mind.

Need Assistance?

InConsult has a proven track record of helping councils improve risk management, resilience, governance and internal audit processes. We have particular expertise in the area of public access to government information. Contact us for an obligation free discussion on how we can help you prepare for and implement GIPA on 02 9241 1344 or email Mitchell directly at mitchellm@inconsult.com.au.