



office of the
information
commissioner
new south wales

Consultation paper 1:

Development applications and personal information on websites – issues for local councils

November 2010

promoting open government

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OIC consultation paper 1: November 2010

1. Context

Individuals supply government agencies with a significant amount of personal information. The nature and type of information varies depending on the functions of the agency, and the purpose for its collection and use. Local councils hold a vast amount of personal information collected for a number of purposes and used in different ways. For example, councils hold information about all ratepayers and owners of companion animals. Councils also collect and hold information about people who lodge or object to development applications (DAs), or whose property is the subject of an order or approval. Some of this information may be of a personal or nature.

While information contained in DAs can be personal, it is also government information for the purposes of the *Government Information (Public Access) Act 2009 (NSW)* (GIPA Act) because it is information held by a government agency. The GIPA Act makes it mandatory for all government agencies to publish certain information, known as “open access information”, about their policies and functions. The Regulation made under the GIPA Act also lists additional open access information that local councils must make publicly available. This includes information about DAs, and other information about council approvals and orders that may contain personal information. Councils must disclose this open access information on their websites and make it publicly available for inspection and copying. The requirement to publish information on a website applies unless there is an overriding public interest against disclosure, or if it would involve an unreasonable cost to the agency.

Feedback the Office of the Information Commissioner (OIC) has received from the local government sector shows that information associated with DAs is proving to be both challenging and complex. The DA process is a public one, and the requirement to make information about DAs publicly available predates the GIPA Act, having been previously required under section 12 of the *Local Government Act 1993 (NSW)*.¹ However, the requirement in the GIPA Act to put the information on a website raises potential conflicts when some of that information may be personal or sensitive. Requiring publication of such information is an important public accountability measure; it helps to achieve transparent decision-making, and enables public participation in decisions that affect people at local and community levels. On the other hand, when the information concerning DAs is personal information, the privacy implications of publishing it on a website need to be considered.

Councils unsure of how to comply with both the GIPA Act and privacy laws when publishing information on their websites have approached the OIC for guidance. We have also heard from members of the public concerned about having their personal details published online. It seems there is not currently a consistent practice across the local government sector, with some councils publishing no information about DAs to avoid contravening privacy laws, while other councils publish all information they receive supporting or objecting to DAs, including names, addresses, mobile phone numbers, signatures, and the costs associated with building projects.

To provide more certainty and consistency around the publication of personal information on websites, the Information Commissioner has decided to develop a guideline in accordance with sections 12(3) and 14(3) of the GIPA Act. The principles underpinning such a guideline would reflect the need to comply with the mandatory disclosure requirements in the GIPA Act and Regulation, and to respect the operation of the privacy laws regarding disclosure of personal information.

A guideline about the type of personal information that should and should not be published on a website needs to be workable in practice, represent a reasonable and practical outcome for local councils, and also reflect public expectations about disclosure of government information and protection of personal information.

¹ . Section 12 of the *Local Government Act 1993 (NSW)* was repealed on 1 July and replaced by the GIPA Act and the GIPA Regulation.

Purpose of this paper

This paper seeks information about current practices of local councils for publishing information about DAs on their websites.

We would like local councils to tell us:

- what processes or policies apply to publishing DAs on their websites in (in order to comply with the GIPA Regulation)
- any specific considerations that are applied in respect to personal information included in DAs
- the extent to which the consent of the person to whom the information relates is obtained and taken into consideration
- the resources that are required to fulfill this activity, such as staff and IT systems
- what sort of assistance the OIC could provide.

We would like members of the public to tell us:

- whether the information on council websites about DAs is adequate and appropriate
- what type of information, if any, should not be published about DAs
- whether councils should consult individuals if they plan to publish their personal information on council websites.

Analysis of the information we receive will be published on our website, without identifying any individuals or agencies.

Under sections 12(3) and 14(3) of the GIPA Act, the Information Commissioner may make guidelines to assist agencies regarding the public interest considerations in favour of, or against, disclosure of information. Agencies are required to have regard to these guidelines in accordance with section 15(b) of the GIPA Act. We will use the results of this consultation process to develop guidelines on how local councils should apply the public interest test to decisions about publishing open access information on their websites that contains personal or sensitive information, with specific relevance to DAs. Before issuing any guidelines, the Information Commissioner will consult with the Office of the Privacy Commissioner. It is anticipated that the guidelines will be published, along with the results of this consultation process, in the first quarter of 2011.

Note: this paper does not cover the issue of copyright and open access information. The OIC is separately considering the specific matter of local councils releasing copies of architectural plans under the GIPA Act and copyright laws.

While the scope of this paper is limited to DAs and personal information, we would be interested to know if the issue is causing particular challenges in relation to other open access information, for example, approvals and orders.

How to respond

Individuals and agencies may respond to the issues identified in this paper by:

- emailing the OIC at ocinfo@oic.nsw.gov.au
- posting their response to:
Office of the Information Commissioner
GPO Box 7011
Sydney NSW 2001
- telephoning the OIC on 1800 INFOCOM (1800 463 626).

Closing date for submissions: **Friday 14 January 2011.**

2. DAs and disclosure requirements

The commencement of the GIPA Act on 1 July 2010 marked the start of a new way of thinking about public access to information held by government agencies, including local councils. Under the Act, agencies are encouraged, and in some cases required, to proactively release as much information as possible. Section 6 of the GIPA Act requires agencies to make certain information, known as “open access information”, publicly available unless there is an overriding public interest against disclosure. Open access information is to be made publicly available free of charge on a website maintained by an agency (unless to do so would impose unreasonable additional costs on the agency) and can be made publicly available in any other way that the agency considers appropriate.

In addition to the general open access requirements that apply to all agencies, the *Government Information (Public Access) Regulation 2009* (NSW) (GIPA Regulation) lists further open access information that is specifically relevant to local councils. As well as making this additional information available on their websites, local councils must offer the opportunity to inspect the information at council offices, and provide copies of records (or facilities for making copies) to any person either free of charge or for a charge not exceeding the reasonable cost of photocopying.²

The open access information local councils must disclose includes:

- information about the council contained in:
 - codes
 - reports (annual, financial and auditor’s)
 - management plans
 - policies concerning the payment of expenses incurred by and facilities provided to councillors
 - returns of the interests of councillors and designated persons³
 - agendas, business papers and minutes of meetings
- plans and policies
- information about DAs
- information about approvals, orders and other documents.

Of particular relevance is the requirement to publish information about development applications.

Schedule 1[3] to the GIPA Regulation provides:

- (1) Information contained in the following records (whenever created) is prescribed as open access information:
 - (a) development applications (within the meaning of the *Environmental Planning and Assessment Act 1979*) 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.

² See GIPA Regulation Part 2, clause 4(1).

³ The Information Commissioner has issued guidelines on how local councils should disclose information contained in the returns of the interests of councillors and designated persons: see http://www.oic.nsw.gov.au/agdbasev7wr/_assets/oic/m15000112/gipa_guidelines_1_local_government%20.pdf.

(b) records of decisions on development applications (including decisions made on appeal)

(c) a record that describes the general nature of the documents that the local authority decides are excluded from the operation of this clause by subclause (2)

(2) This clause does not apply to so much of the information referred to in subclause (1) (a) as 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.

(3) A local authority must keep the record referred to in subclause (1) (c).

Type of information contained in DAs

DAs contain information about building regulations that apply to each council and whether or not the development complies with these regulations. Typically, DAs will contain:

- information about the subject property, including the owners and builders
- the nature, scale and cost of the proposed development
- drawings showing the dimensions, configuration and layout of the proposed development
- the impact of the development on neighbouring properties and the local area
- photographs of the subject and neighbouring properties.

During the DA process, councils place public notices in local newspapers, on the property concerned, on council noticeboards and, increasingly, on their websites, briefly outlining the nature of the proposal and the address of the property to which it relates. Adjoining and nearby property owners are also invited to make submissions in relation to a DA.

Information associated with DAs may be supplied by property owners, adjoining residents, builders, architects and town planners. Documents associated with DAs are likely to contain a significant amount of personal information. Personal information is defined in Schedule 4[4] to the GIPA Act to mean:

“information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion”.

It does not include information about an individual who has been dead for more than 30 years, or information revealing a person’s name and non-personal contact details that discloses nothing more than the fact that he or she was engaged in the exercise of public functions.

While much of the information contained in DAs is supplied by individuals or companies as part of their business activities and is therefore non-personal in nature, DAs generally contain information about the owners of the property to whom the application relates, which may include:

- names, addresses and signatures
- personal contact details
- financial details
- photographs identifying individuals
- health information used to support a DA.

DA information can also include submissions lodged by owners of neighbouring properties, where relevant, which will not only reveal their name, address and signature, but may at times contain emotive and possibly even defamatory content.

Practice prior to the GIPA Act

Before the GIPA Act commenced on 1 July 2010, section 12 of the *Local Government Act 1993* (NSW) required local councils to make similar information publicly available for inspection and copying. While there was no requirement for the information to be published on councils' websites, many councils did this anyway.

Under section 739 of the *Local Government Act 1993* (NSW), people could ask that their addresses be removed from any documents required to be publicly disclosed under that Act, if the person considered that the disclosure would place their personal safety or the safety of their family members at risk. The OIC understands that it was common for many councils to inform people of this right in the letter inviting submissions on DAs.

Since the mandatory disclosure of open access information is no longer governed by the *Local Government Act 1993* (NSW), section 739 no longer applies to that information. Councils must now apply the public interest test under the GIPA Act to determine whether or not particular information should be disclosed, and the manner in which it should be disclosed.

3. Public interest considerations

As with all other open access information, information about DAs listed in the GIPA Regulation must be published on councils' websites unless this would present an unreasonable cost to a council, or if there is an overriding public interest against disclosure in this manner.

In order to decide whether there is an overriding public interest against disclosure, councils need to apply the public interest test, and weigh the considerations in favour of release against those that favour non-disclosure. The considerations against disclosure must be such that they outweigh those in favour, overturning the general presumption in the GIPA Act in favour of disclosure (see section 5).

Public interest considerations in favour of disclosure

There are no limits to the type or number factors that may be taken into consideration in favour of disclosure. Section 12 of the GIPA Act contains a number of examples of factors that favour disclosure of information, such as:

- disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance government accountability or contribute to positive and informed debate on issues of public importance;
- disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds;
- disclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

Making DA information publicly available contributes to the transparency of the decision-making process, and is an important accountability measure.

Publishing information on the website of a local council enhances its accessibility, making it more readily available to people who may be interested in, or directly affected by, the information. In most cases, it also makes the information available more quickly, and is more convenient for people who may not be able to inspect the information at council offices during business hours. This increased availability and access is important for people who may wish to contribute to the process, given the relatively short period members of the public have to make submissions on DA material. All of these factors serve the public interest.

Public interest considerations against disclosure

Section 14 of the GIPA Act lists seven categories of consideration that may be taken into account in deciding whether information should not be disclosed. Most relevant to determining whether information in DAs that also contains personal information should be disclosed on the website of a local council is the third category, which provides:

3 Individual rights, judicial processes and natural justice

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

- (a) reveal an individual's personal information

- (b) contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* or a Health Privacy Principle under the *Health Records and Information Privacy Act 2002*,
- (c) prejudice any court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings,
- (d) prejudice the fair trial of any person, the impartial adjudication of any case or a person's right to procedural fairness,
- (e) reveal false or unsubstantiated allegations about a person that are defamatory,
- (f) expose a person to a risk of harm or of serious harassment or serious intimidation,
- (g) in the case of the disclosure of personal information about a child —the disclosure of information that it would not be in the best interests of the child to have disclosed.

The Information Protection Principle dealing with disclosure of personal information is contained in section 18 of the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act) and states that:

- (1) A public sector agency that holds personal information must not disclose the information to a person (other than the individual to whom the information relates) or other body, whether or not such other person or body is a public sector agency, unless:
 - (a) the disclosure is directly related to the purpose for which the information was collected, and the agency disclosing the information has no reason to believe that the individual concerned would object to the disclosure, or
 - (b) the individual concerned is reasonably likely to have been aware, or has been made aware in accordance with section 10, that information of that kind is usually disclosed to that other person or body, or
 - (c) the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.

Section 18 does not completely prohibit publishing DA information that contains personal information on a website, since section 5 of the PPIP Act states that nothing in that Act serves to lessen the obligations agencies must exercise under the GIPA Act. However, the fact that publishing personal information online could contravene section 18 of the PPIP Act is a relevant consideration against disclosing such information in that manner.

In considering the public interest in publishing DA information on their websites, councils should keep in mind the purpose of the disclosure provisions. By requiring the publication of information about DAs, the GIPA Regulation aims to promote accountability and transparency of, and facilitate community participation in, government decision-making. The provisions are not aimed at promoting public awareness of people's personal information.

4. Issues and options

The OIC has identified four options for dealing with personal information that forms part of the open access information that councils must disclose in relation to DAs. Each of these has advantages and disadvantages. Other options may become evident following this consultation process.

Option 1 – put no, or minimal, DA information on websites

Under this option, no information at all to do with DAs would be posted on council websites. Alternatively, councils might post minimal details similar to those advertised in local papers outlining the DAs received and the DAs determined, listing addresses only, but not all of the information required by the GIPA Regulation.

DA information would still continue to be disclosed at council offices and people invited to make submissions.

This would have the advantage of certainty for local councils in terms of the procedures they need to follow, and would afford a high level of protection for personal information. On the other hand, this option would contravene the intent of the GIPA Act and Regulation, as it would limit the publication of any information about DAs, not just personal information. Disclosing minimal or no information about DAs on council websites is not consistent with the objects of the right to information system in New South Wales, as it does not support transparent decision-making or facilitate community participation in decisions affecting important local issues.

Option 2 – publish all information about DAs on websites

The second option is to publish all information in DAs, irrespective of whether it is personal information or not. We understand that some councils are currently doing this, and notifying people when they lodge DAs, or make a submission in response to a DA, that the information will be made public on the council's website. In some cases, councils give people the option to ask that their names and signatures be removed.

The advantage of this full-disclosure option is that the public is fully informed about the DA process and the basis on which council decisions are made. From the council's point of view, this option affords certainty since no discretion needs to be applied. All information received could be entered or scanned and posted directly onto the website. However, the lack of a discretionary element can be problematic. As noted earlier, DAs may contain a significant amount of personal information, not all of which may be suitable for online publication. For example, the OIC is aware of some councils publishing photographs identifying people in their homes submitted as part of a DA. While the photographs alone may not create particular problems, they can raise privacy concerns when published in combination with people's names, addresses, signatures and financial details. Similarly, we are aware that some councils have published information about medical conditions supplied to support a DA or an objection.

Option 3 – publish no personal information about DAs on websites

A third option is to publish all non-personal information about DAs, but not include any personal information. The advantage of this option is that the privacy of people's personal information is protected. However, inflexible application of this option may work against the rationale for disclosing information about DAs in the first place. For example, a person's address is personal information, but withholding address details from information about a DA would render the information useless. Also, disclosure of some personal information may be necessary to give context to decisions made in relation to DAs.

A disadvantage for local councils is that this option would be time-consuming and a challenge to put into practice, as administrative staff who might not necessarily be trained to make such decisions would need to examine each DA, and every new document that was received in respect of a DA, to decide what was personal information in order to exclude it from publication on the website.

Option 4 – not publish some categories of personal information

Under this option, there would be some categories of personal information in DAs that local councils should never publish on their websites due to the need to protect the privacy of the individual concerned. These categories might be, for example, signatures, medical information, financial details, photographs identifying individuals and contact numbers.

The advantage of this option is that it would provide certainty to councils about what to publish, and members of the public would be clear about what information would appear on websites. It also has the advantage of balancing the disclosure requirements in the GIPA Act and Regulation promoting transparency and accountability, while recognising that some personal information should be afforded greater protection. A disadvantage could be that some councils might have to change the way they enter and publish DA information, which could have time and cost implications, especially when the current processes are highly automated or volumes are high.

5. Questions

The OIC would greatly value your opinion on the matters raised in this paper. Your answers to the questions below will assist in developing guidelines to help local councils decide what personal information associated with DAs should be published on their websites.

Questions 1 to 9 are specifically aimed at local councils, while questions 10 to 13 are framed more generally for members of the public.

The OIC will protect any personal information it collects during this consultation process. The results will be reported on our website without identifying individuals or councils.

Name (optional):

Postcode:

Name of council:

Questions for local councils

Current practice

1. What processes or policies apply to publishing DAs on your council website?
2. Are any specific considerations applied in respect to personal information included in DAs?
3. Please describe the extent to which and the way in which the consent of the person to whom the information relates is obtained and taken into consideration.
4. What resources are required to fulfill this activity, such as staff and IT systems?

Space for further notes, if necessary:

(Please note: should you require more space to comment, please attach additional pages to your submission)