

NEWCASTLE EAST RESIDENTS GROUP INC

v

NEWCASTLE CITY COUNCIL

(NCAT, Proceeding No. 2017/0033562)

SUBMISSIONS OF THE COUNCIL IN RESPONSE TO APPLICANT'S SUBMISSIONS

INTRODUCTION

1. These submissions are made by the Respondent Council in response to the Applicant's Submissions dated 31 January 2018. They are provided pursuant to leave granted by the Tribunal on 8 February 2018. It is against the above background that the Council makes certain confined submissions.
2. The background facts and the relevant *Government Information (Public Access) Act 2009 (GIPA Act)* provisions were identified in the parties' written submissions. This response will address 3 discrete matters arising from the Applicant's Submissions:
 - **The Public Interest**
 - **The Factors Against Disclosure**
 - **A brief summary of Council's position**

THE PUBLIC INTEREST

3. The Applicant contends that Council has '*misconstrued its statutory role and consequently misapplied appropriate public interest considerations.*' In its submissions the Applicant has sought to broadly establish that:
 - i. Council has no statutory power to support local tourism (Para 51 and 53).
 - ii. The running of the Newcastle Supercars Event (**the Event**) is an issue of public importance as a consequence of the alleged impacts of the Event on '*the community and residents of Newcastle.*' (Para 13).
 - iii. This public importance, it is asserted, is such that extra weight should have been given to public interest considerations in favour of disclosure of information (Para 13).
4. Council submits that each of these assertions is factually and legally incorrect. The Applicant has strayed into error in arguing that Council has no

statutory role in supporting local tourism. In addition, it is submitted that the public interest is not raised merely by asserting the alleged impacts of the Event. Finally, the submissions include assertions that, *inter alia*, contain factual assumptions that in this matter are not established by the evidence, are irrelevant, or do not assist the Tribunal.

Statutory Functions of Council

5. In relation to the statutory powers of Council under *the Local Government Act 1993*, Council submits that support for local Tourism and public fixtures, such as the Event, fall squarely within the very broad functions of the Council. Council is a body politic of the State with perpetual succession and the legal capacity and powers of an individual.

Council may provide goods, services and facilities, and carry out activities, appropriate to the current and future needs of the local community and wider public (s 24 *Local Government Act 1993*). Chapter 6 of that Act sets out the service functions of Councils, which include *'the provision, management or operation of community, public health, cultural, recreational, environmental protection services and facilities.'*

The NSW Civil & Administrative Tribunal has previously accepted, for the purposes of administrative review, that Councils have a role in supporting and sponsoring local tourist events. In *Woodhouse v City of Sydney Council* [2012] NSWADT 95 at [37] the Tribunal noted:

..... I also accept that sponsorship of major events involving use of Council's facilities and services is part of Council's legitimate business and commercial interests. Even though these interests are exercised for the benefit of the community, they are nevertheless legitimate business and commercial interests.

Council submits the business relationship between Destination NSW, Supercars Australia and Council in relation to the Event falls within the community cultural and recreational functions of Council.

A Private Interest

6. The Applicant in submissions speaks of the alleged impacts of the Event on 'the community and residents of Newcastle.' (Para 13). Council submits that whilst the Applicant and its members may have an interest in the impacts of the Event, it not open to the Applicant to speak for the whole of the Newcastle community. In fact, it is Council as the democratically elected body representing the interests of all residents that is empowered to speak for the whole Newcastle community.

The Applicant represents its members, who are residents in the area affected by the Event. However, the GIPA Act is directed to the public interest in promoting and protecting public interest issues in respect of Government operation, not a 'private' interest, such as the Applicant's interest in seeking the documents (*JY v Commissioner for Police, NSW Police* [2008] NSWADT 306 at [55]).

It is submitted that no evidence is before the Tribunal that enables it to conclude that the Applicant is seeking to maintain anything other than a private right. No weight should be given to the submissions by the Applicant that purport to identify the public interest on behalf of '*the community and residents of Newcastle.*' That role is a statutory function that rests with democratically elected Council and its officers.

Public Importance: Alleged Impacts

7. Council submits that the Applicant is mistaken in its assertion that the Event is an issue of public importance as a consequence of the alleged impacts to the community.

Council says that merely providing newspaper clippings reporting purported community concerns does not amount to evidence. The matters giving rise to the Applicant's broad assertion of public interest concerns are merely opinion, and are unsupported by evidence and are not issues for these proceedings. An assessment of the actual impacts of the Event cannot occur in a review of an administrative decision under the GIPA Act.

Council submits that as a matter of fact and law, the alleged impacts of the Event do not make it an issue of 'public importance' such that extra weight should have been given to public interest considerations in favour of disclosure of information.

Unsupported Assertions

8. The assertions made in the Applicant's submissions which the Respondent says are not established by evidence include:

Para 16

The existence of the race circuit with engineered grades encourages informal racing and 'hooning' by younger drivers on a continuous basis making the streets less safe and adversely impacting on the amenity of the area all year round

Para 25

- *In plain language residents and leaseholders within the declared racing area have their rights usurped and replaced by an absolute right held by the race promoter*
- *Therefore residents have virtually no avenue of to seek redress, clarification or to hold the authority to account for its actions.*

Para 27

The concerns of the community around the conduct of the Newcastle Coates Hire 500 motor race include that the race:

- *Has appropriated the rights of landowners and tenants*
- *In addition to the adverse impact on residents has adversely affected schools and businesses*
- *Forced residents to lose work and take holidays when they otherwise would not*
- *Compromised the health and safety of elderly residents in public and private housing*
- *Forced families to leave for the safety of their children and pets*

Council considers that the above assertions are not supported by any objective evidence, are self-serving and amount to opinion and hearsay evidence and not probative of any issue in the proceedings.

Relevance

9. Further, the Applicant's Submissions include reference to the provisions of the *Motor Racing (Sydney and Newcastle) Act 2008 (the Motor Racing Act)*. It is unclear, what, if any relevance the individual provisions raised by the Applicant have to the issue before the Tribunal.

The Applicant's discursive Submissions regarding the Motor Racing Act are challenged on the basis of relevance. These powers of the Authority to operate the race and construct a racing track at the discretion of Destination NSW (**DNSW**) are irrelevant to the balancing exercise required under the GIPA Act and have no probative value. No weight should be given to the provisions of the Motor Racing Act referred to by the Applicant as they are irrelevant to the statutory balancing exercise.

Council does not object to the submission of the statement of Christine Everingham or Julian Ellis. However, Council submits that these statements are irrelevant to the balancing exercise required under the GIPA Act and have no probative value.

Council also submits that the various newspaper clippings, the Fitting foam earplugs instruction sheet and the Copy of letter from DNSW to EDO regarding the Supercars approval are irrelevant to the statutory balancing exercise and should be given no weight.

SPECIFIC GROUNDS

10. Council makes the following submissions in reply to the Applicant's Submissions regarding the specific public interest grounds raised by Council against disclosure.
11. **Ground 1 in relation to 1(c): prejudice relations with, or the obtaining of confidential information from, another government,**

The Applicant asserts that:

'It is not possible to prejudice the ongoing relationship with another NSW Government Agency which has the same legal obligation to implement the objectives of the GIPA Act.' (Para 35)

The first point to be made is that Council is not a NSW Government Agency. Council is a separate and discreet level of Government to the State Government of NSW created by statute. Whilst the statutory obligations of each entity under the GIPA Act may be the same, the interests and obligations of the two entities are not the same.

The second point is that regardless of it being a government agency, DNSW is entitled to the same consideration as any entity that has interests capable of being prejudiced by the release of information.

On that basis it is submitted that it is possible to prejudice relations between Council and a NSW government agency that has entered into legal contracts with Council. In this case, DNSW has clearly stated that disclosure would prejudice the agency's functions. It follows that disclosure would likely prejudice relations between Council and DNSW. Given the position of DNSW in opposing the disclosure of its commercial interests, this concern is based on a rational, factual basis.

12. **Ground 2 in relation to 1(d): prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions**

Council has entered into legal contracts with Supercars. It is submitted that sponsorship and support of Tourism, including the Event, form part of Council's statutory functions. Supercars have objected to the disclosure of information around its legal relationship with Council.

It follows that the effect of disclosure is that it would be reasonably likely to prejudice relations between Council and Supercars. The effect, based on the rational, underlying factual basis of disclosure of its commercial interests, is likely to prejudice the supply to Council of confidential information that facilitates the effective exercise of Council's functions.

Although the contracts with Supercars have been entered into, disclosure would likely prejudice other potential partners from seeking the sponsorship and support of Council for significant public events.

In relation to the MOU entered into by the parties, the fact that it is not an enforceable commercial contract doesn't reduce the likely prejudice that would result from its disclosure based on the responses provided to Council by the affected parties.

13. **Ground 3 in relation to 1(f): prejudice the effective exercise by an agency of the agency's functions**

The Applicant contends that Council has misunderstood its 'primary purpose' and that tourism promotion is subservient to the statutory functions of the Council described in the Local Government Act 1993.

I refer to the submissions set out in Paragraph 5 above and confirm that Council has an important role in promoting local tourism in accordance with its statutory functions. Disclosure of confidential commercial agreements could reasonably be expected to prejudice the effective exercise of Council's statutory functions. This adverse impact is based on the prejudice to Council's partners by disclosure described in their response to consultation.

14. **Ground 4 in relation to 1(g): found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence,**

The Applicant submits that the words could reasonably be expected are to be given their ordinary meaning. Council agrees with this test, but says that an action for breach of confidence could reasonably be expected to occur as Council would be in breach of an express clause in the agreements. Having regard to the likely prejudice that the parties have stated would flow from

disclosure, it is submitted that such an action is not merely a possibility or a risk.

Council rejects the assertion made by the Applicant that there has been a lack of transparency around the approval and operating conditions of the Event. The Event is a statutory creation of the NSW Parliament and subject to the rigours of the parliamentary process. It is not open to the Applicant to set an arbitrary standard for public consultation and then alleged a failure to meet that standard as a basis for any public interest.

A private interest may coincide with or equate to a public interest in disclosure, but it is the public interest, not the private interest, which is to be considered when balancing the competing interests in disclosure. Debate around the impacts on residents health and amenity are not relevant to the agreements the subject of these proceedings.

15. **Ground 5 in relation to 4(a): undermine the competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market.**

Council submits that the fact that the phrase economic growth is not present in the Local Government Act 1993 is not in any way relevant to whether Council, DNSW or Supercars may suffer competitive advantage or disadvantage in any market.

Whilst the general cost to Council of its support of the Event has been publicly discussed, the substance of the agreements between the parties remains confidential.

16. **Ground 6 in relation to 4(d): prejudice any person's legitimate business, commercial, professional or financial interests.**

Council does not accept that the Event, as is alleged, 'a harmful and intrusive impact on residents.' Members of the Applicant's Association and individual residents may have concerns, but they cannot be put higher than mere concerns. No evidence is before the Tribunal of any actual adverse impact of the Event.

It is submitted that harmful and intrusive impacts, alleged or actual, are irrelevant to the question of whether the parties will suffer prejudice to their business, commercial, or financial interests. The view of Council is that disclosure would undermine competitive neutrality in connection with the function of Council as the representative of all Newcastle residents.

SUMMARY

17. Council submits that the Tribunal can be satisfied that the disclosure sought by the Applicant would reveal commercially valuable information. It follows that disclosure could reasonably be expected to prejudice the effective exercise by Council of its functions.

Supporting and sponsoring the Event is integral to Council's functions in providing the whole community cultural and recreational opportunities. These functions also involve significant commercial interests. Disclosure could reasonably be expected to prejudice those interests and the effective exercise of Council's functions. Council submit that this public interest consideration against disclosure should be given significant weight.

The submissions by the Applicant around the operation of the Motor Racing Act and the concerns of certain residents regarding possible adverse impacts are not relevant to the agreements the subject of these proceedings. What is sought is to maintain confidentiality concerning the content of commercial agreements.

Council submits that the relevant public interest grounds to override the presumption in favour of disclosure are clearly made out on the evidence.

Dated: 13 February 2018



James MARSHALL
Solicitor