office of the information commissioner
new south wales

'OFFICER OF THE UNIVERSITY' and MACQUARIE UNIVERSITY

Complaint under s17 of the *Government Information (Information Commissioner) Act 2009* (GIIC Act), concerning Macquarie University and issues arising from the exercise of its functions under the *Government Information (Public Access) Act 2009* (GIPA Act).

Date of investigation report: 9 March 2011

A Background

1. The complainant in this matter, referred to in the publication of this report as Officer of the University ('OU') was the University Secretary, General Counsel and Registrar of Macquarie University ('the university') from June 2008 to August 2010.

2. In late July 2010, OU contacted the Office of the Information Commissioner (OIC) to discuss the status of Macquarie University under the GIPA Act. OU informed us that she had been told that the Information Commissioner had exempted Macquarie University from the operation of the GIPA Act and she wished to confirm that this was the case.

3. On 30 July 2010 the Information Commissioner responded by letter to the Vice Chancellor of Macquarie University, Professor Steven Schwartz, and included OU in that correspondence. The Commissioner advised the Vice-Chancellor that the OIC had been contacted by OU with an enquiry and she confirmed that the GIPA Act applied to the management and release of the University's information.

4. On 8 September 2010, OU sent an email to the Commissioner informing her that she had been terminated on 23 August 2010.

5. On 21 September 2010 OU made a complaint to the OIC. In her complaint, OU indicated that she believed she had been terminated at least in part because of both her attempts to implement the GIPA Act at the university and for her contact with our office. OU stated that she was told that one reason for the termination was her 'communications regarding the GIPA Act'.

6. The OIC accepted the complaint and notified the university. We obtained evidence via interviews and correspondence files from the university. We held interviews with OU and four staff members from the University. All interviews

were recorded and transcribed. We received email correspondence from the University related to the termination of OU and the University's implementation of the GIPA Act in 2010.

7. As the correspondence provided and interviews undertaken were part of confidential investigation proceedings I have minimised references to specific comments in this report.

B Issues

8. OU's employment.

9. Whether the ending of OU's employment was connected with her efforts to exhort the university to comply with the GIPA Act, including communicating with the OIC.

10. The university's response to its obligations under GIPA.

11. Whether the university properly responded to its obligations under the GIPA Act.

12. The complaint raised issues about the way in which the university had responded to the GIPA Act. There are overlapping and distinct issues raised by this aspect of the investigation.

C Summary of findings

13. I have formed the view that:

- The decision to terminate OU did not constitute a breach of either the GIPA or GIIC Acts.
- While considerably delayed, the university has made an effort to comply with its obligations under the GIPA Act.

D Comments

14. I do, however, make the following comments adverse to the university:

I. The response to OU contacting the OIC was inappropriate and may have undermined proper communications to ensure compliance, as it could have inhibited staff from contacting our office in an open manner.

II. OU provided clear evidence that she was criticised by the Vice Chancellor for contacting our office to clarify the position for NSW universities in light of discussions between the NSW Vice Chancellors' Committee (NSWVCC) and the OIC. The university's correspondence and oral evidence confirmed that OU was informed that all further communication with our office would be via the NSWVCC.

III. The response of the university to its statutory obligations has been inadequate, particularly for a large organisation with sound legal support

that had been advised of the university's obligations in a timely manner. Given the university had previously been subject to freedom of information legislation, there was no justification for the delayed response to the GIPA Act.

14.1 **OU's employment**

OU was told her employment would be terminated in a meeting with the university Vice Chancellor and director of human resources on 23 August 2010. There was a subsequent agreement that she resign. Based on our examination of the email correspondence and the interviews, I have formed the view that the actions and comments of OU concerning the university's response to its obligations under the GIPA Act, particularly her interaction with the OIC, may have contributed to the decision to terminate her employment. I accept, however, that there had been concern about OU's communication style and interaction with some other employees and have concluded that there is insufficient evidence to indicate what was the decisive factor in her termination.

I do not believe that OU's efforts to ensure the university complied with its GIPA obligations per se were a factor in the decision.

The university stressed in the interviews that the reason for dismissal centred on concerns about OU's communication style and also referred to some conflict existing in the team. There was evidence that such concerns had been raised with OU in the past and, according to the Vice Chancellor, this had been brought to the attention of the University Council.

OU did in fact inform the OIC as part of her complaint that there had been discussion with her previously concerning her communications and also explained there had been some conflict within the legal office.

I presume that a general counsel would be expected to be a robust communicator and I note that OU appears to have been a valued member of staff given her promotions to various senior roles and performance-based pay rises in 2009. It was clear therefore that the university was satisfied with OU's role although, according to the university, she did not receive a full bonus in 2009.

The human resources manager referred to an investigation he held into whether OU should be dismissed. There was no paperwork from the university provided in relation to the investigation and he stated that he kept no notes of any of his conversations with other staff that led to him recommending the dismissal. There was no paperwork indicating the basis of his recommendation to the Vice Chancellor and no paperwork concerning the termination meeting itself.

While the human resources manager stated that there had been allegations of bullying there was only one email that referred to this and no other documentation concerning such allegations and no evidence of any follow up action. The university also referred to difficult relationships with fellow executive members. In a letter to the OIC, Vice Chancellor Steven Schwartz emphasised that at the meeting on 23 August the discussion centred on OU's working relationship with the Executive and other staff.

In the absence of any documentation it is difficult to determine to what extent OU's relationships with fellow staff were a factor in the decision to dismiss her. I accept

that there had been concerns expressed by certain members of the executive for some time about communication style prior to OU raising any GIPA compliance issues or contacting our office and that these issues were raised at the meeting on 23 August 2010.

I also accept OU's statement that she was told that one reason for her termination was her 'communications in relation to GIPA'. OU clearly and consistently expressed her account of what she was told.

The university did refer to a statement by OU concerning GIPA as one of the factors in her dismissal. At a meeting on 16 August 2010 with the University Policy Reference Group, OU stated in a response to a question that she had been directed not to comply with the GIPA Act.

The human resources manager explained in his interview that this was indicative of OU's approach to communications. He stated that he and another senior executive who were both at the meeting were 'incredibly annoyed' at this statement. In his letter, the Vice Chancellor stated that OU's behaviour at the meeting was 'unacceptable'.

The evidence of the university indicates that OU's statement at this meeting was a major factor in the decision to terminate her. I accept that it was open to the university to be critical of the comments, whether or not they were true, if the university considered they were not to be disclosed at this meeting and/or this was not an appropriate way for OU to respond.

Based on OU's evidence and the email correspondence, it would have been open to OU to believe that she had been directed not to comply with the GIPA Act. It is, however, also open to the university to determine how executive staff communicate these issues.

I therefore believe that the university is legitimately able to refer to OU's comments at this meeting as a factor in her termination and these may have formed the 'communications in relation to GIPA' to which the VC allegedly referred at the termination meeting.

I wish to emphasise that I am not indicating agreement or otherwise with the university's criticism of OU's comments at the meeting but I accept it is for the university to deal with its performance expectations of its staff and particular expectations for its executives. The evidence of the HR manager is that there was significant concern about the comments and that this intersected with earlier issues concerning communication.

Further, whether or not there was justification to terminate is not for this office to address; my concern is with whether OU's compliance actions per se led to her losing her employment. If any other grievance has arisen from the dismissal itself then it is for OU and the university to deal with separately from this matter.

The issue as to whether the university should be progressing with implementation of the GIPA Act arose for a number of staff. Evidence indicates that staff were uncertain as to the university's position in response to the GIPA Act. This indicates that, whatever the compliance problems were, they were being experienced by a number of staff. I have therefore concluded there was no problem specific to OU concerning compliance efforts within the university, so find no direct causal link between this issue and OU's termination.

Contact with OIC

My main concern in this report therefore is with the response of the university to OU contacting our office. It is clearly troubling that a very senior employee of a university would be dismissed shortly after being criticised by the Vice Chancellor for contacting a government agency charged with overseeing compliance with right to information.

In the broader context of the university's inadequate engagement with its statutory obligations and the issues surrounding the response of the NSWVCC to the GIPA Act, I was extremely concerned that contacting the OIC may have contributed to OU losing her position. While I have accepted that the university can point to other factors, I address this as an important issue for this investigation that was central to the complaint to the OIC.

While it would be serious for any employee to lose their job on account of interacting with a compliance agency, OU's seniority raised additional concern for the message this may have sent more junior staff if they had become aware of it.

It is an offence under s43(4) of the GIIC Act to cause detriment to any person for making a complaint, assisting or providing evidence to the OIC. It is an offence under s43(5) of the GIIC Act to dismiss or cause prejudice to an employee on account of the employee assisting the OIC. The maximum penalty for contraventions of either provision is 200 penalty units ($22,000), five years imprisonment, or both.

The OIC accepts that these are serious sanctions so we will require clear evidence both of assisting, complaining and/or providing evidence to the OIC and, as a result, a complainant suffering the relevant detriment.

On one view, OU's contact with our office to clarify the position of the Commissioner in relation to NSW universities could be classified as assistance or providing evidence as we were then apprised of a potentially serious compliance issue.

Her subsequent termination, along with the evidence that she had been criticised for contacting us and informed that further communications with our office were to be via the NSWVCC, indicated a possible link between the detriment suffered and her communication with our office. It was confirmed in correspondence and at the interviews we conducted that the NSWVCC did not want individual universities to contact the OIC and that communication should be via the committee.

I believe this aspect of the complaint raised significant compliance issues for the university, particularly in relation to the potential impact on relevant staff if they had become aware of what had happened. I determined it was not a matter we would refer for prosecution, however, as the 'assistance' was collateral to the purpose of OU contacting the OIC, which was to clarify the university's position as part of her compliance work.

Further, the other issues raised about OU's employment, including the comments made at the 16 August meeting, make it difficult to show sufficient causation between the university's response to OU contacting the OIC and the termination, such as to demonstrate a contravention of s43(5).

In a separate matter, OU has informed the OIC that she spoke to a member of the university Council and stated that this person had criticised her for bringing the

complaint with the OIC. This was raised with the university which investigated the matter. Both OU and the university referred to the Council member concerned as being supportive of OU while she was with the university.

The university has confirmed that OU had a conversation with the Council member and that he told OU he was surprised that she had made a complaint after she had left the university. The Council member has said that he did not make the criticism alleged.

I make no finding on this matter and refer to it here only to note that agencies must take care not to target any individual who has approached our agency to raise concerns. If a complainant is able to show they have suffered any 'violence, punishment, damage, loss or disadvantage' on account of making a complaint to our office then it may enliven the s43(4) sanction.

14.2. **The university's response to its obligations under GIPA**

The investigation has revealed serious deficiencies in the university's compliance with the GIPA Act, arising from the delayed response to its obligations.

As noted above, it emerged in this investigation that there was an email discussion between university executive staff suggesting the Information Commissioner had exempted NSW universities from compliance with any or all provisions of the GIPA Act. This is difficult to comprehend given the experience and legal knowledge of the parties.

Disagreeing with statutory provisions cannot possibly be understood by any competent professional as the basis for non-compliance. The university has stated it was acting in good faith in this matter based on a communication from a person who had been in the NSWVCC meeting with the Information Commissioner. Whether or not there was genuine confusion arising from the discussions with the OIC in July 2010, this was cleared up in the Commissioner's letter to Professor Schwartz of 30 July 2010. The letter made clear that universities were required to comply with the GIPA Act and the Commissioner was in no position to provide exemptions from any of its obligations. This should have resulted in immediate action.

It is of course open to any agency subject to particular legislation to lobby for its amendment and/or seek to narrow its application. It is obviously not open to continue with a 'business as usual' approach, that is, not comply with new statutory obligations because a lobbying process may be underway

I have serious concerns about the university's understanding of its statutory obligations and there were clearly some communications from the executive that appear to have delayed the university from properly responding to the GIPA provisions.

The correspondence made clear that certain university staff involved in the implementation of GIPA were held back in their work by instructions from the executive. The university asserted at interview that any references to staff being told to 'stop' their work on implementation meant 'work out how to respond' and, further, that this was only in relation to the contracts register, that is, the university's implementation of its contracts register obligations under ss27-31 of the Act. The university asserts that there was a broader context to these comments in which the

issue was clarified but there was no reference to this context in the email correspondence examined.

Further, even if the directive were solely concerned with the contracts register, there was no justification for even partial non-compliance. The Act was assented to in June 2009. The university should have addressed issues arising from the legislation before its commencement on 1 July 2010 to ensure it was compliant when the Act came into force.

What also became clear in this investigation is that the university had no appreciation that it has been required to publish its contracts register since 1 July 2007, pursuant to s15A of the *Freedom of Information Act*. While ignorance is of course no defence, it appears this has been a common issue in the NSW university sector.

There was a significant amount of work done by internal legal staff as well as advice from external counsel on the university's compliance obligations. There was also considerable correspondence between the university and the NSWVCC as to the tertiary education sector's response to the Act. Given there was no doubt that universities had been subject to the FOI Act, it is difficult to comprehend why compliance with any relevant aspect of the GIPA Act could be a matter for debate.

The university was in contravention of the FOI Act by not publishing its contracts register while that Act was in force. Given its resources and the expertise of its staff, the university should have been far more advanced in its compliance with the GIPA Act by the time it came into force. It has contravened the GIPA Act by not publishing its open access information in a more timely manner.

During our interviews, the university was able to point to a significant amount of work being done on its website in response to its GIPA obligations. I note that this did not properly get underway until the engagement of their information director who started work on 19 July 2010, well after the commencement of the Act, in what was a new role to the university. Further, it had to be pointed out to the university that the information pages it had developed in response to the GIPA Act could not be found via searches from the university home page. This was still the case in February 2011 but I note that these pages are now accessible from the university website's home page.

It is unfortunate that the good work of its staff was delayed by what I consider to be an unjustifiable approach of certain senior staff to the university's statutory obligations. It is important that the university review its compliance procedures to ensure staff charged with these functions are able to carry out their work unimpeded by the policy position of the executive, which may be operating in accordance with a broader political agenda.

Given the issues that have arisen in this investigation – and the potential for staff to be hindered in carrying out their work or liaising with the OIC – we will require the university to report to us on their processes relating to how staff exercise the university's functions under GIPA Act. The university will also need to demonstrate its compliance with its obligations under the Act.

E Conclusions

Having regard to the issues identified in this report, I have formed the following conclusions:

- Macquarie University's termination of OU on 23 August 2010 did not contravene the GIIC Act.

- The criticism of OU for contacting the OIC to clarify the status of the university under the GIPA Act was inappropriate and likely to have undermined effective compliance with the Act.

- The direction that communications with the OIC be via the NSWVCC was inappropriate and likely to have undermined effective compliance with the Act.

- The delays in implementation of the GIPA Act by Macquarie University were not justified and appear to have resulted from interference by the university executive with compliance efforts of the staff.

- As a result of the delays, the university contravened s6 of the GIPA Act by not complying with its open access obligations.

F Recommendations

I therefore propose that Macquarie University take the following steps:

- Publicly affirm its commitment to complying with the GIPA Act. This may be both via its internal communications with all staff and on its website;

- Provide a written report on the processes it has put in place to promote compliance within three months of the date of this report, with a copy to be provided to the responsible Minister.

The OIC will conduct a formal audit of Macquarie University's compliance with the GIPA Act in six months' time (September 2011) and will provide a copy of its report to the responsible Minister.

Deirdre O'Donnell
Information Commissioner
9 March 2011