



Review report under the *Government Information (Public Access) Act 2009*

Applicant: Mr Ian Cranwell
Agency: Leichhardt Municipal Council
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Summary

1. Mr Ian Cranwell (the Applicant) applied for information from the Leichhardt Municipal Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided that there was an overriding public interest against providing access to the information in the way requested by the Applicant and offered to provide access to the information requested in a different way.
3. The Information Commissioner makes the following recommendations in relation to the Agency's decision:
 - a. That the Agency make a new decision, by way of internal review pursuant to section 93 of the GIPA Act.
 - b. That the Agency revise its procedures for information access requests so that future notices of decision comply with the requirement of section 72 of the GIPA Act, pursuant to section 95 of the GIPA Act.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to the following information:

Plan submitted for D2013/205 and any amendments for development consent
5. In its decision issued on 6 March 2015, the Agency decided to provide access to the information in full. Access to the electronic records was provided at Council's Customer Service Centre during council opening hours.
6. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that he is seeking a copy of the requested information.

Decisions under review

7. The decision under review is the Agency's decision that there is an overriding public interest against disclosing information in the way requested by the Applicant.
8. This is a reviewable decision pursuant to subsection 80(i) of the GIPA Act.

The public interest test

9. The Applicant has a legally enforceable right to access the information requested, unless there is an overriding public interest against disclosing the information (section 9(1) of the GIPA Act). The public interest balancing test for determining whether there is an overriding public interest against disclosure is set out in section 13 of the GIPA Act.
10. The general public interest consideration in favour of access to government information set out in section 12 of the GIPA Act means that this balance is always weighted in favour of disclosure. Section 5 of the GIPA Act establishes a presumption in favour of disclosure of government information.

11. Before deciding whether to release or withhold information, the Agency must apply the public interest test and decide whether or not an overriding public interest against disclosure exists for the information.
12. Section 13 requires decision makers to:
 - a. identify relevant public interest considerations in favour of disclosure,
 - b. identify relevant public interest considerations against disclosure,
 - c. attribute weight to each consideration for and against disclosure, and
 - d. determine whether the balance of the public interest lies in favour of or against disclosure of the government information.
13. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.
14. The Agency has decided to provide access to the information requested in full. The subject of this external review is the form in which access is provided.
15. The Agency must apply the public interest test found at section 13 of the GIPA Act and do so in the context of the manner in which access is to be provided rather than in the context of whether to disclose the information.

Forms of access

16. Section 72 of the GIPA Act details how access to information may be provided. Section 73 provides that conditions may be imposed as to how a right of access may be exercised.
17. Subsection 72(1) lists the ways an applicant can access information. The Applicant requested a copy of 'plans and elevations' of building works at a specified address. The Agency refused to provide copies of the plans, but offered the Applicant the opportunity to inspect the record.
18. This is a form of access to information permitted under subsection 72(1)(a) of the GIPA Act.
19. Subsection 72(2) states that an agency must provide access in the way requested unless disclosure in that way would have certain effects. The section then lists the effects that provide an agency the opportunity to provide access to information in a way other than that requested by an Applicant (subsections 72(2)(a)-(d)).
20. In its notice of decision the Agency did not specify which subsection of section 72(2) it was relying on to provide access to the information in a way other than that requested by the Applicant.
21. Based on additional information provided to the Applicant (not included in the notice of decision) it seems the Agency by implication relied on subsection 72(2)(d). This subsection allows an agency to provide access in a way other than that requested, if there is an overriding public interest against disclosure of the information in the way requested.

Public interest considerations in favour of disclosure

22. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information, which must always be weighed in the application of the public interest test. The Agency may take into account any

other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).

23. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
 - a. The statutory presumption in favour of the disclosure of government information.
 - b. 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 of issues of public importance.

Public interest considerations against disclosure

24. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
25. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to be raised as relevant, the Agency must establish that the disclosure of the information *could reasonably be expected to have the effect* outlined in the table.
26. The words “could reasonably be expected to” should be given their ordinary meaning. This requires a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect the effect outlined.
27. In its notice of decision the Agency did not identify any public interest considerations against disclosure of the information.

Additional information provided to the Applicant

28. In separate correspondence to the Applicant dated 12 March 2015 the agency noted the information to which the Applicant sought access is open access information. The Agency noted that *GIPA Regulations* Schedule 1 subclause 3(2)(a) provides that the open access requirements do not apply to:

The plans and specification for any residential parts of a proposed building, other than plans merely showing its height and its external configuration in relation to the site on which it is proposed to be erected.

...
29. The Agency has correctly identified that this provision deals with documents which are the subject of open access requirements. However it is important to note that the Applicant did not seek access to information through this access pathway.
30. The Applicant sought access to the ‘plans and elevations’ of building works at a specified address through the formal access pathway available through the GIPA Act. Accordingly the agency is required to deal with the access request and respond to the Applicant in accordance with the requirements of the GIPA Act for a formal access application.
31. In its correspondence of 12 March 2015 the agency also cited three additional public interest considerations against providing a copy of the information to the Applicant, noting that doing so could reasonably be expected to:

- a. Endanger, or prejudice any system or procedure for protecting the life, health or safety of any person (clause 2(d) of the table to section 14 of the GIPA Act);and
 - b. Endanger the security of, or prejudice any system or procedure for protecting any place or property or vehicle (clause 2(e) of the table to section 14 of the GIPA Act);
 - c. Expose a person to a risk of harm or of serious harassment or serious intimidation (clause 3(f) of the table to section 14 of the GIPA Act).
32. These above consideration may be relevant to the Agency's decision regarding the form in which access is to be provided. However the Agency must do more that cite these public interest considerations against providing the Applicant with access to the information in the form requested.
33. In order to rely upon these public interest considerations against disclosure the Agency must identify the relevant public interest consideration against disclosure of the information in the form requested by the Applicant and identify the elements of each consideration as relevant to the current request for access.
34. The Agency must then apportion weight to these considerations against disclosure in the form requested by the Applicant and apply the public interest test (discussed below) in the Agency's notice of decision.

Application of the public interest test

35. To correctly apply subsection 72(2)(d) the Agency must demonstrate that there is an overriding public interest against provision of the information in the way requested by the Applicant.
36. The notice of decision should contain a discussion of the various considerations identified in the separate email correspondence sent to the Applicant on 12 March 2015.
37. It is necessary for the notice of decision to:
- a. identify the public interest consideration against disclosure in the form requested by the Applicant;
 - b. contain a discussion of the considerations as relevant to this particular application for access;
 - c. explain the weight attributed to each public interest consideration, both for and against disclosure; and
 - d. contain an explanation of why the disclosure of the information in the alternate way does not create an overriding public interest against disclosure.
38. There is no examination of the risks or potential for harm that providing a copy of the plans creates. Nor is there an examination of the mitigating factors that support the Agency's decision to offer an alternative way of accessing the information.

Findings

39. The Agency has decided that there is an overriding public interest against disclosing the information in the way requested and offered to provide access in a way other than that requested by the Applicant.

40. The Agency has not satisfied its obligations under section 97(1) of the GIPA Act in making this decision, because it has not justified its decision that there is an overriding public interest against disclosure of the information in the way requested by the Applicant.
41. Accordingly we are of the view the Agency did not correctly apply section 72 of the GIPA Act because it did not:
 - a. clearly identify the reason for not providing access to the information in the way the Applicant requested as required by subsection 72(2) of the GIPA Act.
 - b. correctly apply the test found in subsection 72(2)(d) of the GIPA Act. Specifically, when applying the public interest test found at section 13 of the GIPA Act the Agency did not:
 - i. Identify the public interest consideration(s) against disclosure in its notice of decision
 - ii. Clearly attribute weight to each of the public interest considerations and consequently did not demonstrate how it weighed the public interest considerations for and against disclosure against one another
 - iii. Demonstrate that there is an overriding public interest against disclosure of the information in the way requested by the Applicant.

Notice of decision

42. Section 61 of the GIPA Act provides that when an agency refuses to provide access to information or where an agency declined to provide access to information in the form requested by the Applicant because there is an overriding public interest against disclosure, its notice of decision must include the following:
 - a. the reasons for its decision to refuse access;
 - b. the findings on any key questions of fact, and the source of the information on which the findings are based; and
 - c. the general nature and format of the records that contain the information sought.
43. Although not required by the GIPA Act, as good practice a notice of decision for formal applications should include:
 - details of the searches conducted by the agency to locate the information asked for;
 - the reasons for the agency's decision to withhold the information or to provide access in an alternate form including:
 - public interest considerations in favour of disclosure in the form requested by the Applicant and why the agency considers them relevant to the information sought;
 - public interest considerations against disclosure of the information in the form requested and why the agency considers them relevant to the information sought; and

- the agency's decision after balancing the public interest considerations for and against disclosure;
- appropriate details of relevant consultations made as required under section 54 of the GIPA Act;
- details of any personal factors of the application under section 55 of the GIPA Act that the agency has taken into account in making its decision;
- details about whether any processing charges will be payable for access to the information and how those charges have been calculated (as required by section 62 of the GIPA Act);
- whether the agency will record details about the access application in its disclosure log (as required by sections 25 and 26 of the GIPA Act); and
- a schedule of documents itemising the documents falling within the scope of the access application, including a description of the record, location of the record within the agency, format of the record, public interest considerations in favour of, or against disclosure, the corresponding GIPA Act sections for any such considerations, and whether the information was released.

Recommendations

44. The Information Commissioner recommends under section 93 of the GIPA Act that agency make a new decision, by way of internal review.
45. In making a new decision, have regard to the matters raised and guidance given in this report.
46. The Information Commissioner recommends under section 95 of the GIPA Act that the agency review its procedures for information access requests so that future notices of decision comply with the requirements of section 72 of the GIPA Act.
47. We ask that the Agency advise the Applicant and us by **10 May 2015** of the actions to be taken in response to our recommendations.

Review rights

48. Our reviews are not binding and are not reviewable under the GIPA Act. However a person who is dissatisfied with a reviewable decision of an agency may apply to the NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.
49. The Applicant has the right to ask the NCAT to review the Agency's decision.
50. An application for a review by the NCAT can be made up to 20 working days from the date of this report. After this date, the NCAT can only review the decision if it agrees to extend this deadline. The NCAT's contact details are:

NSW Civil and Administrative Tribunal
Administrative and Equal Opportunity Division
Level 10, John Maddison Tower
86-90 Goulburn Street,
Sydney NSW 2000

Phone: 1300 006 228
Website: <http://www.ncat.nsw.gov.au>

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51. If the Agency makes a new reviewable decision as a result of our review, the Applicant will have new review rights attached to that new decision, and 40 working days from the date of the new decision to request an external review at the IPC or NCAT.

Completion of this review

52. This review is now complete.
53. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.

Elizabeth Tydd
Information Commissioner