



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

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<b>Applicant:</b>	<b>The first applicant</b>
	<b>The second applicant</b>
<b>Agency:</b>	<b>University of Newcastle</b>
<b>OIC reference:</b>	<b>11-156 and 11-270</b>
<b>Date review request received:</b>	<b>12 August 2011 and</b> <b>22 August 2011</b>
<b>Date of this report:</b>	<b>30 May 2012</b>

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**Summary of this report**

1. The first applicant, from the National Tertiary Education Union (**NTEU**)'s Newcastle Branch made an access application to the University of Newcastle (**the University**) requesting details of the salaries, allowances, bonuses and Key Performance Indicators of ten specific university staff members for the past three financial years.
2. The University decided to release the requested information regarding five of the university staff members but determined there was an overriding public interest against disclosing the information of the other five staff.
3. We have reviewed the University's decision and had consideration to its GIPA file, internal reviews conducted and submissions from third parties.
4. We uphold the University's decision regarding disclosure of the information of the university staff listed in Part A and its refusal of access to the information of the staff members listed in Part B.
5. We recommend the University reconsider its decision about the information relating to one staff member as, if the University holds this information, then the first applicant is entitled to access to it unless there is an overriding public interest against disclosure.
6. Further details and our reasons for these recommendations are set out below.

## Background

7. On 15 March 2011, the first applicant made a formal access application to the University requesting the following:
  - i. The annual base salary, paid to the persons listed, by the University of Newcastle and/or its associated companies in the past three completed financial years.
  - ii. Any and all allowances, “at-risk” payments or bonuses, beyond annual base salary, paid to the persons listed, by the University of Newcastle and/or its associated companies in the past three completed financial years.
  - iii. Any and all Key Performance Indicators, allocated to the persons listed, by the person’s supervisor or supervisors in the past three completed financial years.
    - (1) Chancellor
    - (2) PVC Research
    - (3) Deputy Vice-Chancellor (Services)
    - (4) Chief Information Officer
    - (5) Academic Registrar
    - (6) Director, Facilities Management
    - (7) Director, Marketing and Public Relations
    - (8) Pro Vice-Chancellor and CEO (Singapore)
    - (9) Pro Vice-Chancellor and Director of the Central Coast Campus
    - (10) Director, Human Resources
8. In its notice of decision of 24 May 2011, the University set out its decision in two sections- Part A (decision to release the information of five staff members) and Part B (decision to refuse access to the information of the other five staff members).

## Our review

9. We received the first applicant’s request to review the University’s decision on 9 June 2011, which is a reviewable decision under section 80(d) of the GIPA Act.
10. In conducting our review, we considered the University’s notice of decision dated 24 May 2011 and also looked at its GIPA file, internal reviews conducted at the request of two third party objectors to the University’s original decision, as well as submissions received by the University during third party consultation.
11. As we mentioned above, the University has separated its notice of decision into Part A and Part B. Discussion of both sections will be undertaken in this report.

## The public interest test

12. A person who makes an access application for government information has a legally enforceable right to access the information requested unless there is an overriding public interest against disclosing the information.
13. Section 13 of the GIPA Act sets out the public interest test as follows:

There is an overriding public interest against disclosure of government information for the purposes of this Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.

14. The University must:

- identify the public interest considerations in favour of disclosure;
- identify the relevant public interest considerations against disclosure;
- determine the weight of the public interest considerations in favour of and against disclosure; and
- decide where the balance between those interests lies.

15. In applying the public interest test, the University must also follow the principles outlined in section 15 of the GIPA Act.

## **Public interest considerations in favour of disclosure**

### **PART A**

16. Part A of the decision is in relation to the release of the remuneration details of the following university staff members:

- Chancellor
- PVC Research
- Deputy Vice-Chancellor (Services)
- Academic Registrar
- Pro Vice-Chancellor and Director of the Central Coast Campus

17. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information. This consideration must always be weighed in the application of the public interest test. The nature and scope of other public interest considerations in favour of disclosure, which may be relevant in the application of the public interest test, are not prescribed (section 12(2) GIPA Act).

18. The notes to section 12(2) of the GIPA Act set out some examples of public interest considerations in favour of disclosure. The University has considered the following public interest factors are relevant in this application:

- disclosure of the information meets the purpose of the GIPA Act, that is, to open government information to the public in order to maintain and advance a system of responsible and representative democratic government that is open, accountable, fair and effective (section 3(1) of the GIPA Act);
- disclosure of the information could reasonably be expected to enhance government accountability and the accountability of public officers; and
- disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.

19. The personal factors of the application may be relevant considerations in balancing the public interest test, including in favour of disclosure (section 55 of the GIPA Act). Personal factors which may be taken into account include:
- the applicant's identity and relationship with any other person;
  - the applicant's motives for making the access application; and
  - any other facts particular to the applicant.

## **PART B**

20. Part B of the decision is in relation to the release of the remuneration details of the following university staff members:
- Chief Information Officer
  - Director, Facilities Management
  - Director, Marketing and Public Relations
  - Director, Human Resources
21. The University applied the same public interest considerations in favour of disclosure in Part B as it did in Part A of its decision.

## **Public interest considerations against disclosure**

### **PART A**

22. The only public interest considerations against disclosure, which may be considered in the application of the public interest test, are those set out in the table to section 14 of the GIPA Act. To raise these as relevant considerations in the application of the public interest test the agency must establish that the disclosure of the information "...could reasonably be expected to have ...the effect" outlined in the table.
23. The University provided two public interest considerations against disclosure from the table at section 14 of the GIPA Act, which provides that there is a public interest consideration against disclosure and information if it could be reasonably expected to:
- clause 3(a) - reveal an individual's personal information; and
  - clause 4(d) - prejudice any person's legitimate business, commercial, professional or financial interests.

### **Individual rights, judicial processes and natural justice - clause 3(a) of the table to section 14 of the GIPA Act**

24. The University opined that the requested information contained individuals' personal information within the meaning of clause 4 of Schedule 4 to the GIPA Act, which is a public interest consideration against disclosure.

25. The nature of this information also triggers the need for the University to undertake consultation with the third parties (section 54 of the GIPA Act).

#### **Business interests of agencies and other persons- clause 4(d) of the table to section 4**

26. The University also considered this clause to be a relevant public interest factor against disclosure. Clause 4(d) states:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice any person's legitimate business, commercial, professional or financial interests.

27. As the first applicant is requesting the remuneration details of individual university staff, this could potentially disadvantage them in their ability to negotiate future employment contracts.
28. Both this clause and clause 3(a) give rise to the requirement for third party consultation, as it involves personal information concerning the university staff's professional and financial interests (section 54(2) of the GIPA Act).

#### **Consultation on public interest considerations- section 54**

29. Section 54(1) of the GIPA Act states that an agency must take steps (if any) as are reasonably practicable to consult with a person before providing access to information relating to the person in response to an access application if it appears that:

- the information is of a kind that requires consultation under this section; and
- the person may reasonably be expected to have concerns about the disclosure of the information; and
- those concerns may reasonably be expected to be relevant to the question of whether there is a public interest consideration against disclosure of the information.

30. Section 54(2) states that information relating to a person is of a kind that requires consultation if it includes personal information about the person or concerns the person's business, commercial, professional or financial interests.

#### **PART A**

31. During the consultation process, the University received formal written objections from three out of the five parties who objected to disclosure on the basis it was their personal information which would be released. The University notes it had regard to this when weighing up the public interest considerations for and against disclosure.
32. Two of the third parties indicated they had no objection to the disclosure of their information.

#### **PART B**

33. The University applied the same public interest considerations against disclosure in Part B as it did in Part A.

34. During consultation with third parties, four (out of a total of four) of the third parties made formal written objections to disclosure of the information on the basis that it was their personal information and that its release would have an impact on their professional prospects within the Hunter region.
35. We have reviewed the third parties' submissions and agree that disclosure of the requested information could reasonably be expected to have a negative impact on their employment opportunities in the future.
36. Two staff members also raised concerns of a personal nature. These objections were provided to the University confidentially. While we received a copy of the personal objections of one staff member, we have been advised that the other staff member did not consent to the release of his/her objections to us due to confidentiality concerns.
37. The subject staff member has been informed that in the exercise of functions in connection with a review, we are obligated not to disclose any information for which there is (or for which an agency claims there is) an overriding public interest against disclosure in the course of our review (section 91 of the GIPA Act). Despite this, the staff member maintained that his/her personal objections were not to be released to us and so we have not been able to look at all the material that the University considered when making its decision.
38. The University has indicated that in balancing the public interest considerations for and against disclosure, it only gave weight to the objections of the staff member that were provided to us. As we have not had the opportunity to consider the objections of the other staff member, we cannot be satisfied that the University only attributed weight to the objections of the staff member whose submissions were provided to us.

### **Balancing the public interest test**

39. The GIPA Act does not provide a set formula for working out the weight of public considerations for or against disclosure or deciding if one set of considerations outweighs the other.
40. Whatever approach is taken, this is a question of fact and degree to which different answers may be given without being wrong (as long as the decision maker acts in good faith and makes a decision available to them under the GIPA Act).
41. In balancing the public interest factors against release of the information, the University considered that the information is personal information and that releasing this could reasonably be expected to prejudice a person's legitimate professional and financial interests.

### **PART A**

42. The University notes that in making its decision to disclose information, it had regard to consultation with the third parties and objections that were made by them with respect to the release of the information (section 54 of the GIPA Act), however the objections did not cause it to change its view that the public interest consideration in favour of disclosure was stronger than that against disclosure.

43. Our guideline - Personal information as a public interest consideration under the GIPA Act, states several purposes for the requirement to consult under section 54 of the Act, including:
- ascertaining whether the third party to whom the information relates objects to the disclosure of some or all of the information and the reasons for any such objection and
  - balancing the rights to access information and the rights of individuals to protect and control the privacy of their personal information.
44. It is not the role of the third party to decide if there is an overriding public interest against disclosure. The views of third parties are just one of the matters that an agency needs to consider in determining if any public interest considerations against disclosure apply, and if so, how significant they are.
45. The University refers to several sources to support its decision to release the requested information including:
- NSW Ombudsman Annual Report 2008-2009;
  - NSW Legislative Council General Purpose Standing Committee No 2 Report No 30 "Governance of NSW Universities" 1 June 2009;
  - Letter from Honourable Verity Firth MP, Minister for Education and Training to Lynn Lovelock, Clerk of the Legislative Council & Clerk of the Parliaments, dated 23 March 2010;
  - *The Annual Reports (Statutory Bodies) Act 1984*; and
  - *The Annual Reports (Statutory Bodies) Regulations 2010*.
46. Additionally, Tribunals and Information Commissioners have in the past supported the public interest consideration in favour of disclosure of the remuneration of senior public officers, including university staff (Examples include *Re Asher and Department of State and Regional Development* [2002] VCAT 609 (6 August 2002) and *Re Stewart and Department of Transport* [1993] QICmr 6 (9 December 1993)).
47. We also refer the University to the case of *Re National Tertiary Education Industry Union (Murdoch Branch) and Murdoch University; Ors* [2001] WAICmr 2 (2 January 2001), in which the Western Australian Information Commissioner decided that the disclosure of the total remuneration of senior officers (including Divisional heads) of Murdoch University would, on balance, be in the public interest.
48. Once the University determined that there was a public interest in favour of disclosure of the information, two third party objectors requested an internal review of the original decision. The internal review officer upheld the University's original decision.
49. Following this, one of the applicants did not continue to pursue the matter further, however the other internal review applicant requested that we conduct an external review. This is discussed in further detail below.

## **PART B**

50. The University notes that the same considerations were taken into account for Part B as for Part A but it decided that the public interest considerations against disclosure



outweighed the public interest considerations in favour of disclosure of the information for the Chief Information Officer and the Directors (the staff listed in Part B).

51. The University also had regard to the following factors in making its decision not to release the requested information:
  - Consultation with third parties and objections that had been made with respect to the release of the information;
  - The University does not consider the listed university staff in Part B to hold positions which are part of the university executive;
  - There are positions similar to the university staff in Part B within the local region and release of the information would lessen the ability for these staff to negotiate a salary package with an alternative employer; and
  - Consideration that business interests of the University may be undermined if the remuneration details of its staff are revealed to its competitors.
52. Although the same public interest factors for and against disclosure were considered for the University staff in Part A and Part B, the difference is that the University staff in Part A held roles specific to universities (Chancellor, Vice Chancellors and Academic Registrar). As discussed above, there is a general public interest consideration in favour of disclosure of remuneration details of university staff, especially those who are part of the university executive.
53. Further, as the University states in its notice of decision, amendments to the *Annual Reports (Statutory Bodies) Regulation 2010* also require universities to publish a detailed breakdown of salary packages and performance bonuses paid to its executives.
54. However, the University staff members in Part B are employed in roles which are not specific to universities and are available in other sectors (Chief Information Officer and Directors). Should these staff members wish to pursue a role outside of the university market, the public disclosure of their current remuneration details could have a negative impact on their ability to negotiate future employment contracts.
55. The University also lists its business interests as a public interest factor against disclosure, however the test that is to be applied is clause 4(a) of the table to section 14, which states:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to undermine 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.
56. If the University wishes to rely on clause 4(a) as a consideration against disclosure, it must list it in its notice of decision (in accordance with section 61 of the GIPA Act). As the University has not done so in this instance, we will not be discussing it any further in this report.



## Information regarding Mr Robert J. Cochrane

57. We note that the University advises that the Pro Vice-Chancellor and CEO (Singapore) is an employee of the University of Newcastle, Singapore. The University states this is a Singaporean company and therefore not subject to the GIPA Act.
58. Further, the University says there is no fiscal relationship between that person and the University and so concludes his information is beyond the scope of the GIPA request.
59. Nevertheless, the University should note that there is a presumption in favour of disclosing government information provided for at section 5 of the GIPA Act and the definition of government information is that which is contained in a record held by an agency (section 4 of the GIPA Act). Therefore, if it holds the remuneration details of that person in its records, then there is a presumption in favour of disclosure of this information.

## Our review of the second applicant's matter (OIC Reference: 11-270)

60. The second applicant is one of two University staff members who applied for an internal review of the original decision made by the University regarding access to their personal information, being remuneration details from the last three financial years.
61. As the second applicant is a staff member listed under Part A, the University decided to release her information despite her objection that disclosing the information would be releasing and revealing her personal information.
62. Consequently, the second applicant sought an internal review of this decision and on 15 July 2011, the internal review officer upheld the original decision.
63. On 22 August 2011, the second applicant made an application to us seeking an external review.
64. As second and first applicants' matters are related, we sought their consent to prepare a joint review report. Both parties agreed to this arrangement.
65. Since receiving the internal review decision, the second applicant has experienced significant changes in personal circumstances. The second applicant believes that releasing the information would now have the following effects:
  - Prejudice any court proceedings by revealing matters prepared for the purposes of, or in relation to, current or future proceedings (clause 3(c) of the table to section 14 of the GIPA Act); and
  - Prejudice any person's legitimate business, commercial, professional or financial interests (clause 4(d) of the table to section 14 of the GIPA Act).
66. While we think that clause 4(d) may be a relevant consideration against disclosure, the University has noted in its decision that it has considered this clause but has still decided to disclose the information of the University staff listed in Part A, including the second applicant.

67. However, clause 3(c) is also a significant public interest consideration against disclosure and after discussions with the second applicant, we have discovered that she is in the middle of legal proceedings, which the second applicant believes relates to the disclosure of her remuneration details.
68. During the course of our review, the second applicant has consented to the release of her remuneration information but has specified this be done only after the legal matter has been finalised. However, the second applicant has been unable to provide a date for when these legal proceedings will conclude and on this basis, the first applicant has indicated that she is not amenable to waiting an indefinite period of time until the second applicant's remuneration details are disclosed.
69. Our view is that there is a public interest in favour of disclosing the second applicant's information. We have discussed the subject legal proceedings with the second applicant and although the nature of these proceedings are quite personal, we are not satisfied that disclosure of their remuneration details from the past three financial years could reasonably be expected to prejudice those proceedings (clause 3(c) of the table to section 14 of the GIPA Act).

## **Our recommendations**

70. We uphold the University's original decision regarding release of the University staff members' remuneration details listed in Part A and decision not to disclose information of the staff in Part B.
71. We recommend the University also release the remuneration details of the Pro Vice-Chancellor and CEO (Singapore) if it holds this information, as there is a public interest in favour of its disclosure. It should do this by way of a new decision, which we recommend that it make under section 93 of the GIPA Act.
72. We also uphold the internal review decision to release the information of the two third party objectors.
73. We ask that the University advise the applicants and us by **6 June 2012** of the actions it intends to take in response to our recommendations.

## **Review rights**

74. Our recommendations 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 Administrative Decisions Tribunal (ADT) for a review of that decision.
75. Either or both of the applicants may ask the ADT to review the original decision of the agency if they are dissatisfied with:
  - our recommendations, or
  - the University's response to the recommendations,
76. An application for ADT review can be made up to 20 working days from the date of this report. After this date, the ADT can only review the decision if it agrees to extend this deadline.

77. For information about the process and costs associated with a review by the ADT, please contact the ADT. The ADT's contact details are:

Administrative Decisions Tribunal

Level 10, 86 Goulburn Street,

Sydney, NSW, 2000

Telephone (02) 9377 5711

Facsimile (02) 9377 5723

TTY (02) 9377 5859

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78. If the University makes a new reviewable decision as a result of our review, the applicants 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 OIC or ADT.

### **Closing our file**

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

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