



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

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<b>Applicant:</b>	<b>Graeme Beal</b>
<b>Agency:</b>	<b>City of Newcastle</b>
<b>OIC reference:</b>	<b>11-168</b>
<b>Date review request received:</b>	<b>8 June 2011</b>
<b>Date of report:</b>	<b>17 November 2011</b>

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### **Summary of report**

1. On 10 February 2011 Mr Beal requested a copy of a review report that the City of Newcastle (Council) prepared for the use of the Independent Commission Against Corruption (ICAC). On 14 April 2011 Council refused access to the report citing an overriding public interest against disclosure. Our recommendation is that Council release the report in a redacted form.

### **Our review**

2. In August 2010 Mr Beal made a complaint to ICAC about Council's approval of a development application. ICAC, in its assessment process, asked some questions of Council. As a result, Council engaged an independent reviewer who investigated the circumstances relating to the approval process of the specific development application. The reviewer, 'Sincolutions' provided an investigation report for Council which was in turn provided to ICAC.
3. ICAC has told us that the matter was not referred to Council under s.53 of the *Independent Commission Against Corruption Act 1988* and the report therefore, is not subject to the secrecy provisions of s.111 of that Act. ICAC considers the report to be 'excluded information' under Schedule 2 of the GIPA Act while it is in their hands, but does not consider that it would necessarily be excluded information in the hands of Council.

4. Schedule 2 of the GIPA Act provides for certain information to be considered 'excluded information' of an agency. Section 43 provides that an access application for excluded information will be an invalid application. Schedule 1 of the GIPA Act says there is a conclusive presumption of an overriding public interest against disclosing another agency's excluded information, unless that agency consents to its disclosure. In this case, information that forms part of ICAC's investigative and complaints handling function, is the 'excluded information' of ICAC. As Council holds information which is ICAC's 'excluded information'; Council must first ask ICAC whether it consents to the disclosure of the redacted report before it can be disclosed.
5. We have reviewed the investigation report. As our Office prefers to resolve matters informally, we asked Council if it would agree to releasing the report with the following redaction:
  - a. names and positions
  - b. identifying information in the timeline
  - c. removal of notes of conversation in their entirety
6. We asked Mr Beal for his view and he agreed to this as long as the redaction was not too extensive. However, Council did not agree to releasing a redacted report.
7. We are recommending that Council release a redacted report. Should Council accept our recommendation, pursuant to Schedule 1 clause 6(2) of the GIPA Act, Council will need to ask ICAC's permission before it can disclose the information in the report.

### **Balancing the public interest**

8. In making their decision, Council is required to weigh the public interest consideration in favour of disclosure with the considerations against disclosure. This is known as the 'public interest test'. Council has referred to the public interest test and has referred to weighing the considerations for and against in its decision. The considerations in section 14 of the GIPA Act are purely considerations and do not necessarily hold more weight by virtue of the number that have been identified.
9. The GIPA Act contains a number of provisions that may apply to mitigate the effect of, or reduce the weight of, public interest considerations against disclosure or even avoid an overriding public interest consideration against disclosure altogether (see for example sections 72 to 78 of the GIPA Act).
10. It is consistent with the objects of the GIPA Act that these provisions be considered, where relevant, before a decision is made to not disclose information because there is an overriding public interest consideration against disclosure. In our view, s.74 which provides for the deletion of information from a copy of the record, in this case the report, is applicable.
11. Council's Notice of Decision does weigh factors in favour and against disclosure. However, it refers to the information being 'exempt' under s.14 of the GIPA Act. This indicates to us that it is possible that Council has a misunderstanding that s.14 provides exemptions, rather than considerations against disclosure. This may impact on the

weight given to considerations in the application of the public interest test. To assist Council in assessing future applications, we attach a publication on applying the public interest test.

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

12. Section 12(1) of the GIPA Act provides that there is a general public interest in favour of the disclosure of government information. This consideration must always be weighed in the application of the public interest test.
13. Council has identified the following considerations in favour of disclosure:
  - a. enhancing Council's accountability and providing a transparent process
  - b. that Mr Beal is the person who lodged the complaint to ICAC and to which the report refers.
14. Council has identified enhancing Council's accountability and providing a transparent process as considerations in favour of release. It then goes on to consider this public interest as very limited as there are other means of ensuring Council's accountability. The GIPA Act provides a presumption in favour of the disclosure of government information. This is to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective. The fact that there are additional methods of accountability does not reduce this consideration in favour of release.

### **Public interest considerations against disclosure**

15. There is an overriding public interest against disclosure of government information for the purposes of the GIPA 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.
16. Council has relied on the following provisions in its decision that there is an overriding public interest against disclosure of the report:
  - a. S.14 Table 1(d) disclosure of the information could reasonably be expected to prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions (whether in a particular case or generally)
  - b. S.14 Table 1(f) disclosure of the information could reasonably be expected to prejudice the effective exercise by an agency of the agency's functions (whether in a particular case or generally)
  - c. S.14 Table 1(g) disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (whether in a particular case or generally).

## **Prejudice the supply of confidential information**

17. Section 14 Table 1(d) provides a consideration against disclosure if the disclosure could reasonably be expected to prejudice the supply to an agency of confidential information. The Notice of Decision states that it is likely that Council officers and external consultants will refuse to participate in future investigations of this nature if the report is given to Mr Beal. It argues that this will prejudice the supply of information provided through the investigative process. The decision doesn't identify why Council believes people will not participate in future investigations of this nature. The involvement of staff and a consultant in the report is limited and the report does not make any reason for this concern apparent. Employees and consultants can reasonably be expected to continue to provide such information in the course of their duties. We therefore cannot see how Council gives weight to the consideration against disclosure. In our view, the fact that a person cooperated in an investigation and provided information that related to their role as a public officer, does not in itself carry much weight against disclosure.
18. The report by Sinc solutions makes limited reference to staff members and the external consultant. It comments on aspects of their work as public officers and in the case of the consultant, the work they were contracted to perform. It analyses processes, documents and computer records and applies policy. As stated earlier in this report, s.74 provides for deletion of information in order to facilitate access to information. The report lends itself to having names and positions redacted, while remaining largely the same. This would strike a balance between the considerations against release and those in favour of release.

## **Prejudice the effective exercise of the agency's function**

19. Section 14 Table 1(f) provides a consideration against disclosure if the disclosure could reasonably be expected to prejudice the effective exercise by an agency of the agency's function. Council relies on the argument previously stated that disclosure of the report can reasonably be expected to deter future complaints from being made and deter staff from participating in Council's 'investigative function'. However, Council has not shown us why they believe that it is reasonable to expect that their staff would not participate in future investigations. Again, our view is that s.74 could resolve the issue.

## **Found an action against Council**

20. Section 14 Table 1(g) provides a consideration against disclosure, if the disclosure could reasonably be expected to:
  - a. found an action against an agency for breach of confidence, or
  - b. otherwise result in the disclosure of information provided to an agency in confidence.
21. It should be remembered that these are only considerations against disclosure, and do not necessarily prevent disclosure. The Notice of Decision states that the Sinc solutions report was provided to Council in confidence and marked as such. It does not identify any applicable contractual confidentiality provisions. The fact that a report is marked 'confidential' does not impose obligations upon the handler, other than as an advice on how to handle the report.

22. We accept that it is likely there was confidentiality at the time the investigation took place and when the report was provided to ICAC. With the passage of time and circumstance, this confidentiality is lessened. This is particularly so as the report comments on processes that staff undertake in their analysis and preparation of reports as part of their official duties. At the time of the investigation, confidentiality can be expected. However, we do not consider it reasonable for staff and contractors to expect an ongoing confidentiality relating to information provided about the function they perform in the course of their employment.

### **Release of a redacted report**

23. We have suggested to Council that it considers releasing a redacted report (see paragraph 5 of this report). In response they reiterated the previous concerns reviewed in this report. Additionally, they state the redaction of personal information would be insufficient protection for staff members as it would still be possible to determine their identity. As this consideration was not identified in the Notice of Decision, it only forms part of this review in discussion about our recommendation.

24. The staff members who participated in the investigation to the extent that their views are summarised in the report are few in number. They commented on processes and actions and gave their professional view on how development applications were assessed. In this context these staff are exercising their ordinary employment responsibilities. To this extent, the information is not 'personal information'. A redacted report will balance considerations in favour of release with the considerations against disclosure Council outlines. We have discussed our recommendation with the Deputy Privacy Commissioner who has agreed with our recommendation to release the redacted report.

### **Recommendation**

25. We recommend that the City of Newcastle release the report with the following redaction:

- a. names and positions
- b. identifying information in the timeline attachment
- c. removal of notes of conversation in their entirety.

### **Review rights**

26. Our recommendations are not binding and are not reviewable under the GIPA Act. If Mr Beal is dissatisfied with our recommendations or Council's response, he may ask the Administrative Decisions Tribunal to review the original decision of the agency. For further information in relation to ADT reviews, please contact the ADT on (02) 9223 4677.

27. An application for ADT review can be made within 4 weeks of the date of this report, that is by 15 December 2011.

## **Closing our file**

28. This review is now closed. Please contact the IPC on 1800 472 679 if you have any questions.