



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

Applicant: Mr Steve Donnellan
Respondent: Ku-ring-gai Council
Report date: 6 November 2013
IPC reference: IPC12/R000172
Catchwords: Third party objections
GIPA decision – to release information

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Summary

1. An application for information was made to Ku-ring-gai Council under the *Government Information (Public Access) Act 2009 (GIPA Act)* for access to specific information.
2. Council decided to release information that in Mr Donnellan's view contained his personal information and information that would prejudice his professional interests. Mr Donnellan objected to the release of all the information captured in the access application and lodged an internal review of Council's decision.
3. Under section 92 of the GIPA Act we recommend Council withhold Mr Donnellan's email address from the documents but otherwise we make no recommendations against Council's decision.

Background

4. On 16 May 2012, an applicant applied under the GIPA Act to Council for access to development applications lodged by Mr Donnellan. In Mr Donnellan's view the information captured in the GIPA request contained his personal information and information that if released could prejudice his legitimate business interests.
5. In the decision issued on 31 July 2012, Council decided to release the information with personal information including mobile phone numbers and signatures redacted from the documents.
6. As we understand it Mr Donnellan's objection covers all of the information that Council decided to release.

Decisions under review

7. The decision under review is Council's decision to release information captured in the access application to which Mr Donnellan lodged third party objections.
8. Section 97(2) of the GIPA Act states:

If the review is of a decision to provide access to government information in response to an access application, the burden of establishing that there is an overriding public interest against disclosure of the information lies on the applicant for review.

The public interest test

9. The applicant for the access application 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, Council must apply the public interest test and decide whether or not there is an overriding public interest against disclosing the information.

12. Section 13 of the GIPA Act 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. Council must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

Public interest considerations in favour of disclosure

14. 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. Council may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).
15. In the notice of decision, Council identified the general public interest consideration in favour of disclosure.

Public interest considerations against disclosure

16. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to apply, Mr Donnellan must establish that release of the information *could reasonably be expected to have the effect* outlined in the table.
17. 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.
18. In correspondence to us Mr Donnellan raised three public interest considerations against disclosure of the information. He argues that its release could reasonably be expected to:
 - a. prejudice his legitimate business, commercial, professional or financial interests (clause 4(d) of the table to section 14 of the GIPA Act);
 - b. reveal his personal information (clause 3(a) of the table to section 14 of the GIPA Act); and
 - c. endanger, or prejudice any system or procedure for protecting, the life, health or safety of any animal or other living thing, or threaten the existence of any species. (clause 5(c) of the table to section 14 of the GIPA Act).
19. I will discuss each of these considerations in turn.

Consideration 4(d) – prejudice any person’s legitimate business, commercial, professional or financial interests

20. Clause 4(d) of the table at section 14 states:

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

21. In correspondence to the Information and Privacy Commission Mr Donnellan stated the following:

“the applicants for the information have engaged in an extensive campaign to derail my development applications for 152 residential apartments which has been unjustified, unreasonable, abusive, defamatory and involved numerous threats. They have routinely misused reports and facts, misquoted reports, ‘verballed’ Councillors and other figures in authority with statements they didn’t make to further their own ends. Release of the information the subject of the application could only serve to provide them with more ‘ammunition’ to continue the campaign to derail my commercial and financial interests by continuing to oppose my lawfully approved development applications for 152 apartments. These developments have involved the investment of tens of millions of dollars, which the applicants for the information have been attempting to derail by their campaign to oppose the developments.”

22. Mr Donnellan has provided no evidence to back up claims made in his statement.

23. In the matter *Donnellan v Ku-ring-gai Council*¹ Deputy President Higgins of the Administrative Decisions Tribunal stated the following:

“Property development and decisions made by Local Councils and Government in relation thereto are of considerable interest to local residents and the community at large. Developments of this kind are made in a regulated environment and... development applications and all associated documents are prescribed to be open access information under the GIPA Act, unless there is an overriding public interest consideration against disclosure”.

24. Whilst the release of the information may prejudice Mr Donnellan’s legitimate business interests by contributing to activities that will require his attention we are not persuaded on balance that this public interest consideration against disclosure outweighs the considerations in favour.

Consideration 3(a) reveal an individual’s personal information

25. Clause 3(a) of the table at section 14 as a public interest consideration against disclosure states:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to reveal an individual’s personal information.

26. Personal information is defined in the GIPA Act as being:

¹ *Donnellan v Ku-ring-gai Council* [2013] NSWADT115

...information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion. [Schedule 4(4)(1) GIPA Act]

27. Section 15(b) of the GIPA Act provides that agencies must have regard to any relevant guidelines issued by the Information Commissioner when determining whether there is an overriding public interest against disclosure.
28. In December 2011 the Information Commissioner published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act*. This Guideline sets out what is meant by ‘personal information’ in the GIPA Act and includes (in paragraph 1.2) examples of what should be considered personal information.
29. In correspondence to us Mr Donnellan stated the following:

“The emails include my personal email address and my personal mobile phone number. The emails should not be released as they would reveal this personal information which could be misused by the applicants.”
30. In the notice of decision Council decided to release the information with the exception of personal information, being Mr Donnellan’s phone number and signatures. It is evident that both Mr Donnellan’s signatures and mobile phone number have been removed from the documents.
31. In the matter *Leda Developments Pty Ltd v Tweed Shire Council*² Deputy President Higgins of the Administrative Decisions Tribunal offered the following:

“I accept the name of person A, person B, person C and person D is personal information as there is no evidence of these persons being an employee of a government agency (see cl 4(3)(b) of the GIPA Act). I also accept that the email addresses of person A, person B, person C and person D is personal information about these persons”.
32. In our view Mr Donnellan’s email address is comprised of his personal contact details. The use of his email address for business as well as personal contact does not preclude it from being his personal information.
33. We are satisfied that Mr Donnellan has established there is an overriding public interest against disclosing his email address. We are not satisfied that the other information Council decided to release should be withheld on the basis that it is personal information.

Consideration 5(c) – endanger or prejudice any system or procedure for protecting the environment

34. Clause 5(c) of the table at section 14 states:

There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to endanger, or prejudice any system or procedure for protecting, the life, health or safety of any animal or other living thing, or threaten the existence of any species.
35. In correspondence to us Mr Donnellan stated the following:

² *Leda Developments Pty Ltd v Tweed Shire Council* [2013] NSWADT 121

“The applicants for this information have previously misused information to unjustly accuse me of damaging blue gum high forest on the land the subject of the development applications. Release of the information would provide the applicants with additional information that could be misused yet again, which would compromise the public confidence in the existing legislative framework in place for protecting the environment. This should not be allowed”.

36. Mr Donnellan has not demonstrated what prejudice or endangerment would occur and therefore we are not persuaded this is a relevant consideration against disclosure of the information.

Recommendations

37. Under section 92 of the GIPA Act we recommend Council withhold Mr Donnellan’s email address from the documents but otherwise we make no recommendations against Council’s decision.

Review rights

38. 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.
39. If Mr Donnellan is dissatisfied with our recommendations or Ku-ring-gai Council’s response to our recommendations he may ask the ADT to review Ku-ring-gai Council’s original decision.
40. 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. The ADT’s contact details are:

Administrative Decisions Tribunal
Level 10, 86 Goulburn Street,
Sydney, NSW, 2000

Phone: (02) 9377 5711

Facsimile: (02) 9377 5723

Website: <http://www.lawlink.nsw.gov.au/adt>

Email: ag_adt@agd.nsw.gov.au

Closing our file

41. This file is now closed.
42. If you have any questions in relation to this report please contact our office on 1800 472 679.