



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

Applicant: Southern Highlands Ratepayers Association (inc)  
Agency: Wingecarribee Shire Council  
Report date: 23 January 2014  
IPC reference: IPC13/R000099  
Keywords: Government information – public interest test - reasonable searches – notice of decision

### Contents

Summary .....	2
Background.....	2
Decisions under review .....	3
The public interest test.....	3
Agency decision making process and report structure.....	3
Public interest considerations in favour of disclosure.....	4
Public interest considerations against disclosure .....	4
Search for documents.....	5
Assessment .....	5
Recommendations.....	6
Review rights .....	6
Closing our file .....	7

## Summary

1. The Southern Highlands Ratepayers Association (inc) (the Applicant) applied for information from the Wingecarribee Shire Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to provide access to some information, provide access to other information with redactions and to refuse access to some information.
3. The Information Commissioner makes the following recommendations in relation to the Agency's decision:
  - a. Pursuant to section 93 of the GIPA Act, the Information Commissioner recommends that the Agency reconsider the decision by way of internal review and make a new decision as if the decision reviewed had not been made.

## Background

4. On 14 December 2012, the Applicant applied under the GIPA Act to the Agency for access to information relating to the Bowral Country Golf Course. Information was requested under five headings. These included requests for specific items and unspecified items that fell within certain criteria of subject matter and date range.
5. The Agency identified 117 items of information that fell under the five headings. In its decision issued on 5 February 2013, the Agency decided to;
  - a. provide access to 107 items
  - b. provide redacted copies of three items
  - c. refuse access to seven items
6. The ten items that the Agency refused access to or provided redacted copies of are listed below.

Item no. <sup>1</sup>	Description	Redacted or refused
17	Tax invoice	Refused
19	Email	Refused
30	Tax invoice	Redacted
39	Tax invoice	Redacted
42	Tax invoice	Redacted
65	Email	Refused
79	Letter	Refused
92	Letter	Refused
114	Letter	Refused <sup>2</sup>
117	Letter	Refused

7. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that it is seeking access to the ten items of information that were refused access and redacted.

<sup>1</sup> The item number refers to the number assigned to the item in the schedule of documents the Agency attached to the notice of decision.

<sup>2</sup> Item 114 was erroneously noted as Redacted in the schedule of documents.

8. The Applicant also stated that it did not believe that all relevant information had been identified. The Applicant requested information within the date range 1 January 2009 to 14 December 2012. The Agency identified only one item of relevant information created after June 2010.

### **Decisions under review**

9. The ten decisions under review are the Agency's decisions to:
  - a. refuse access to seven documents (items 17, 19, 65, 79, 92, 114 and 117); and
  - b. provide redacted versions of three documents (items 30, 39 and 42).

### **The public interest test**

10. 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.
11. 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.
12. 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.
13. 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.
14. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

### **Agency decision making process and report structure**

15. In response to the application the Agency provided a notice of decision. Attached to the notice of decision was a schedule of the documents that were identified as falling within the scope of the application.
16. In the notice of decision the Agency assessed the application and made a single decision that covered all the relevant identified information. It states that the Agency decided to provide access to the information the Applicant sought access to. It does not list or discuss any public considerations against disclosure and it does not contain an explanation of how the Agency applied the public interest test. It does not state that any items of information were refused or redacted.
17. The schedule of documents provides an itemised list of the 117 items of relevant information identified. The schedule also briefly mentions public

interest considerations against disclosure for the items of information that were refused access or redacted. It does not contain an explanation of the public interest test or why certain information was redacted.

### Public interest considerations in favour of disclosure

18. 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).
19. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue. Disclosure of the information could reasonably be expected to:
  - a. promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance; and
  - b. ensure effective oversight of the expenditure of public funds.

### Public interest considerations against disclosure

20. 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.
21. 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.
22. In its notice of decision the Agency identified one public interest consideration against disclosure of each item of information it refused access to or redacted. The reasons and GIPA reference, where cited, are summarised below.

Item no.	Redacted or refused	Reason	GIPA reference
17	Refused	Prejudice business interests	s14 (4) (4d)
19	Refused	Prejudice business interests	s14 (4) (4d)
30	Redacted	Prejudice business interests	s14 (4) (4d)
39	Redacted	Prejudice business interests	s14 (4) (4d)
42	Redacted	Prejudice business interests	s14 (4) (4d)
65	Refused	Personal information	Not cited
79	Refused	Legal Professional Privilege	Schedule 1 cl 5 (1)
92	Refused	Legal Professional Privilege	Schedule 1 cl 5 (1)
114	Redacted	Legal Professional Privilege	s14 (4) (4d)
117	Refused	Personal information	Not cited

23. The Agency did not explain why the public interest considerations applied to the items of information nor did it apply the public interest test to weigh the considerations for and against disclosure of information.

## Search for documents

24. Section 53 of the GIPA Act creates obligations on agencies in terms of conducting searches for information. In this instance subsections 53 (2) and (3) are relevant. They state:

### ***53 Searches for information held by agency***

...

*(2) An agency must undertake such reasonable searches as may be necessary to find any of the government information applied for that was held by the agency when the application was received. The agency's searches must be conducted using the most efficient means reasonably available to the agency.*

*(3) The obligation of an agency to undertake reasonable searches extends to searches using any resources reasonably available to the agency, including resources that facilitate the retrieval of information stored electronically.*

25. The notice of decision states that the Agency used six search terms when searching its information management database to identify the relevant information. The search terms were file types (legal files, property files and contract files) attached to the specific subject matter of the application (the golf course).
26. In discussions with the IPC, the Agency stated that it did not conduct searches of hard copy files, emails or other media. It did not do this because all relevant information should be stored in the database in accordance with Agency policy.
27. The Agency also stated that the official who conducted the assessment of the application was not the official who has oversight of the golf course contracts and related matters. The assessing official did not contact the official who has oversight of golf course matters or any other official when searching for relevant information.

## Assessment

28. The Agency stated that it made a single decision to provide information in the notice of decision. However, the decision had 10 exceptions; the refused and redacted items. These decisions were only identified in the schedule of documents attached to the notice of decision. Section 58 (2) of the GIPA Act allows public sector agencies to make more than one decision in respect of a single application. The Agency should have made separate decisions for each of the items of information that it refused access to. In making its decision the Agency should have applied the public interest test and weighed the public interest considerations for and against disclosure before making a decision in accordance with section 13 of the GIPA Act.
29. It appears that the Agency is relying on section 74 to allow the redaction of certain information from the documents. If the Agency uses section 74 it should be mindful that there are two reasons information can be redacted. They are either because the information is not relevant to the information applied for or because (if the information was applied for) the agency had decided to refuse to provide access to that information. The Agency should, in a notice of decision, clearly explain which of these reasons applies.
30. It appears that the Agency has not complied with section 61 of the GIPA Act. This section sets out what information an Agency must include in the notice of decision when it refuses to provide access to information. In this instance subsection 61 (a) and (b) are relevant because the Agency is required to state

the agency's reasons for its decisions and the findings on any material questions of fact underlying those reasons.

31. Although it is the Agency's policy to have all information stored in the database, it might be the case that information relevant to this application is stored elsewhere. It might also be the case that other search terms and consultation with relevant staff could provide additional results. A broader search, both in terms of search terms and where the information is searched for, might yield more relevant information including information produced between July 2010 and December 2012.

## **Recommendations**

32. Pursuant to section 93 of the GIPA Act, the Information Commissioner recommends that the Agency reconsider the decision by way of internal review and make a new decision as if the decision reviewed had not been made
33. We ask that the Agency advise the Applicant and us by **7 February 2014** of the actions to be taken in response to our recommendations.

## **Review rights**

34. 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 NSW Civil and Administrative Tribunal (NCAT) for a review of that decision. If the Applicant is dissatisfied with our recommendations or the Agency's response to our recommendations, the Applicant may ask the NCAT to review the Agency's decision.
35. An application for NCAT review 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  
Level 10  
John Maddison Tower  
86-90 Goulburn Street  
Sydney NSW 2000

**Phone:** 1300 006 228  
**Website:** <http://www.ncat.nsw.gov.au/ncat/index.html>
36. 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.

## **Closing our file**

37. This file is now closed.
38. If you have any questions in relation to this report please contact the IPC on 1800 472 679.