



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

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<b>Applicant:</b>	<b>The Applicant</b>
<b>Agency:</b>	<b>Wyong Shire Council</b>
<b>IPC reference:</b>	<b>IPC13/R000348</b>
<b>Date review request received:</b>	<b>26 July 2013</b>
<b>Date of this report:</b>	<b>30 August 2013</b>

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### Summary of this report

1. The Applicant applied to Wyong Shire Council under the *Government Information (Public Access) Act 2009 (GIPA Act)* for access to:

Name of person and address who lodged a complaint of alleged dog noise. ....

2. By its Notice of Decision, Wyong Shire Council on 18 July 2013 refused to provide the details of the name and address of the person who had lodged the complaint, on the basis of an overriding public interest against disclosure of the information.
3. We agree with the decision by Wyong Shire council to refuse to provide the name and address of the complainant. Our reasons are discussed in this report.

### Our view

4. On 26 July 2013 the Applicant requested that we review the decision by Wyong Shire Council to refuse access to the name and address of the person who lodged a complaint of alleged dog noise.
5. In conducting this review we have:
  - a. examined the agency's GIPA file, which includes the information withheld;
  - b. examined the notice of decision dated 18 July 2013;
  - c. examined the documents provided by the Applicant and which were included with the application for external review;
  - d. considered Guideline 4 – Personal Information as a public interest consideration under the GIPA Act.

- e. considered Guideline 5 – Consultation on public interest considerations under section 54 of the *Government Information (Public Access) Act 2009* published by the Information Commissioner.

### **The public interest test**

6. 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.
7. Before deciding whether to release or withhold information, Wyong Shire Council must apply the public interest test and decide whether or not an overriding public interest against disclosure applies to the information.
8. 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.*

9. Wyong Shire Council must apply the public interest test in accordance with the principles set out under section 15 of the GIPA Act:
  - a. agencies must exercise their functions so as to promote the object of the GIPA Act;
  - b. agencies must have regard to guidelines issued by us;
  - c. it is irrelevant if the disclosure of information might cause embarrassment to, or loss of confidence in, the agency;
  - d. it is irrelevant that information disclosed might be misinterpreted or misunderstood; and
  - e. disclosure, in response to formal access applications, cannot be made subject to any conditions on the use of the information.

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

10. Section 12(1) of the GIPA Act provides that there is a general public interest in favour of disclosing government information. This consideration must always be weighed in the application of the public interest test.
11. Section 12(2) of the GIPA Act set out some examples of public interest considerations in favour of disclosure which are not exhaustive.
12. Wyong Shire Council identified the presumption in favour of disclosing government information found in section 5 of the GIPA Act in its notice of decision. The Council considered the personal factors of the application as relevant considerations in balancing the public interest test, including in favour of disclosure (section 55 of the GIPA Act).

## **Personal Factors of the application**

13. The individual characteristics of the application may be relevant considerations in the application of the public interest test, including in favour of disclosure (section 55 of the GIPA Act).
14. In this case the disclosure of the information pertains directly to the applicant as a person directly affected by the complaint and the owner of the companion animal whom the complaint was made about.
15. The applicant told us that she believed that the allegation that was made was false and an abuse of process.
16. The applicant also identifies that the issue of her dog barking excessively has not been raised with her directly.

## **Third Party Consultation**

17. Section 54 of the GIPA Act provides that an agency must consult with a person before releasing their personal information in order to ascertain whether they have an objection to the release of the information. Any objection is to be taken into account when balancing the public interest test, in accordance with section 54(5) of the GIPA Act.
18. The purpose of section 54(4) of the GIPA Act is to find out whether the person had an objection to an agency disclosing some or all of the information and the reasons why.
19. We note that Wyong Shire Council wrote to the third party. In response the third party objected to the disclosure of their information.

## **Public interest considerations against disclosure**

20. With the exception of Schedule 1 to the GIPA Act, the table in section 14(2) provides the only considerations against disclosure that may be taken into account in applying the public interest test.
21. In order to apply the consideration against disclosure Wyong Shire Council must:
  - a. identify the information;
  - b. characterise it as information to which a public interest consideration against disclosure set out in the Table to section 14 of the GIPA Act applies; and
  - c. demonstrate that disclosure of the information could have the effect deemed not to be in the public interest.
22. In its decision Wyong Shire Council raised two public interest considerations against disclosure from the table at section 14(2) of the GIPA Act. The clauses relied upon by Wyong Shire Council provide that there is a public interest against disclosure if disclosure could reasonably be expected to:
  - a. Clause 3(a) – reveal an individual's personal information

- b. Clause 3(b) – contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* or a Health Privacy Principle under the *Health Records and Information Privacy Act 2002*.

23. We have provided some comments about these considerations below.

### **Reveal an individual's personal information**

24. In its notice of decision Wyong Shire Council identified clause 3 (a) of the table at section 14 (2) as a public interest consideration against disclosure which states:

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

25. In its notice of decision, the Council states that it considered the information personal information, under Clause 3 (a). The Council further states that the information is not publicly available, and has not previously been revealed. Providing access to the information would reveal this information.

26. Schedule 4 clause 4 to the GIPA Act provides:

- a. In this Act, **personal information** means information or an opinion...about an individual...whose identity is apparent or can reasonably be ascertained from the information or opinion

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. In December 2011, we published *Guideline 4 – Personal Information as a public interest consideration under the GIPA Act*, which sets out what is meant by 'personal information' in terms of the GIPA Act.

28. At Paragraph 1.2 of the guideline, examples of personal information, which includes person's name, personal address and contact details, (among others) are set out. We are satisfied that the complainant's name and address applicable in the circumstances of this review, constitutes personal information for the purposes of the GIPA Act.

29. Paragraph 1.5 of the guideline explains what is meant by "whose identity is apparent or can be reasonably ascertained" and is said to be what gives the information its personal context. The identity of a person will be apparent where the information includes his or her name and address.

30. The term "reveal" is defined in clause 1 of Schedule 4 to the GIPA Act as:

*Reveal information means to disclose information that has not already been publicly disclosed (otherwise than by unlawful disclosure).*

31. In this instance we are satisfied that the disclosure of the information would reveal an individual's personal information and that do so carries a significant weight as a public interest consideration against disclosure.

### **Contravene and Information Protection Principle**

32. The Council in its decision also relies on clause 3 (b) of the table to section 14 as a further consideration against disclosure. In order to rely on this consideration against disclosure, Council must demonstrate a reasonable expectation that an information protection principle would be contravened by disclosure of the information, not simply

assert that this would occur.

33. Council has identified section 18 of the *Privacy and Personal Information Protections Act 1998* (PIPP Act) as the relevant principle. Section 18 provides that Council can only disclose someone's personal information without their consent if:
- a) the disclosure is for a related purpose and the Council has no reason to believe that the person would object to the disclosure, or
  - b) if the person was told at the time the information was collected from them that Council would do so, or
  - c) in order to deal with a serious and imminent threat to any person's health or safety.
34. The Council in applying the public interest has concluded that none of the circumstances listed in section 18 arise and therefore to release the information would amount to a contravention of section 18 of the PIPP Act.
35. We are satisfied that the Council has shown this consideration against disclosure applies.

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

36. The GIPA Act does not provide a set formula for:
- a. working out the weight of public interest considerations for or against disclosure, or
  - b. deciding if one set of considerations outweighs the other.
37. Whatever approach is taken, it 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).
38. Paragraph 3.17 of *Guideline 4 – Personal Information as a public interest consideration under the GIPA Act*, addresses the effect of section 5 of the PPIP Act. It states that if an agency finds that either 3(a) or 3(b) or both, are public interest considerations against disclosure and that releasing the information would contravene the PPIP Act, it may still release the information after applying the public interest test under the GIPA Act. This is made clear by section 5 of the PPIP Act, which provides that nothing in that Act, serves to lessen the obligations agencies must exercise under the GIPA Act.
39. Having considered the reasons in the notice of decision, the third party objection and the nature of the information, we are satisfied that Wyong Shire Council has justified its decision.

### **Our final view**

40. Having considered the reasons in the notice of decision, the third party objection and the nature of the information, we are satisfied that Wyong Shire Council has justified its decision. We do not make any recommendations in this matter.

## Review rights

41. 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 Administrative Decisions Tribunal (ADT) for a review of that decision.
42. If the Applicant is dissatisfied with the outcome of our review then she may ask the ADT to review the original decision by Wyong Shire Council.
43. 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.
44. 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  
Internet <http://www.lawlink.nsw.gov.au/adt>  
e-mail [ag\\_adt@agd.nsw.gov.au](mailto:ag_adt@agd.nsw.gov.au)

## Closing our file

45. This review is now closed.
46. If you have any questions, please contact our office on 1800 472 679.