

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

Applicant: The Applicant
Agency: Richmond Valley Council
Report date: 19 May 2016
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Summary

1. The Applicant applied for information from Richmond Valley Council (the Council) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Council decided to provide access to the information and release other information in a particular way.
3. The Information Commissioner makes the following recommendations in relation to the Agency's decision:
 - a. under section 93 make a new decision by way of internal review and
 - b. under section 95 have regard to the guidance in this report in future notices of decision.

Background

4. On 1 December 2015 the Applicant applied under the GIPA Act to the Council for access to the following information:

All the records regarding DA2016.0022 including records of meetings between council staff including CEO John Walker, the owner of the land, the proponent for the development and Roads and Maritime and Pacific Partners. The records should include any meetings councillors had with the land owner and proponent.

In its decision issued on 7 January 2016, the Agency identified two items of information and decided the following:
 - a. DA2016.0022 – access provided with personal information redacted
 - b. Minutes of pre-lodgement meeting dated 18 June 2015 – access provided (no redactions)

Issues raised by the Applicant

5. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed he is concerned that:
 - a. the Council did not decide the application within the statutory timeframe;
 - b. the Council was only prepared to make a copy of the redacted material available at a cost per page and the Council was not prepared to allow the applicant to make a copy with his own device (being by photograph);
 - c. information located by the Council may not be complete; and
 - d. changes were made to the pre-lodgement of minutes between Council and the proponent but there is no public record of this change to the Minutes and how the decision was made to allow the change to be made.

Decisions under review

6. The two decisions under review are the Agency's decisions to:
 - a. the decision to provide access to information in a particular way in response to an access application; and
 - b. the decision that information is not held.

7. These are reviewable decisions under sections 80(d) and 80(e) of the GIPA Act and are discussed further in this report.

Statutory Timeframe for making decisions

8. In his request for external review the applicant raised a concern that the decision by the Council was not made until after the statutory timeframe.
9. Under section 57 of the GIPA Act, an agency must decide an access application and give notice to the applicant of its decision within 20 working days after the agency receives the application. This timeframe is subject to any extension as is provided in section 57.
10. The Applicant made an access application to the Council on 1 December 2015. The application should have been decided by 31 December 2015, subject to any extension of time.
11. The application was decided by the Council on 7 January 2016. We are unaware of any agreements to an extension of time or other circumstances which would give rise to an extension of time under section 57 of the GIPA Act.
12. Therefore it does not appear on the information available to us that the Council decided the application within the statutory timeframe. Although we note that the period in which this application was to be decided coincided with the Christmas and New Year period, we have taken the public holidays into account when calculating the due date.
13. Under section 95 of the GIPA Act we recommend that the Council ensure that in future that it communicate with Applicants where there may be a delay, the reasons for such a delay, and consider whether an extension is required under section 57 of the GIPA Act. If it determines an extension may be required it should communicate such requests to the Applicants. It should also give consideration to the cause for the delay in determining this application and whether any processes need to be developed to avoid a similar situation arising in the future.

Matters not considered in this external review

14. In relation to the third issue raised by the Applicant (point iv of paragraph 6 above), this is not a reviewable decision and is therefore outside of the scope of this review.
15. The GIPA Act is concerned with access to information contained in a record. It is not concerned with questions of whether or not records should be created, or whether records can be edited or otherwise altered. That is a matter of compliance with the *State Records Act 1998* and therefore a question for Council and/or State Records NSW.

The public interest test

16. 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.
17. 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.

18. 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.
19. 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.
20. The Agency 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

21. 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 (s 12(2) GIPA Act).
22. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
 - a. Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance. This is because the information relates to a proposed development which requires community consultation and engagement in the determination of planning matters within the local government area.
23. We are satisfied that it is a relevant consideration. In addition we note the general presumption in favour of disclosure of government information provided for at section 5 of the GIPA Act.

Public interest considerations against disclosure

24. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
25. 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.
26. 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.
27. In its notice of decision the Agency raised one public interest consideration against disclosure of the information, deciding that its release could reasonably be expected to:

- a. reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act) and
- 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* (clause 3(b) of the table to section 14 of the GIPA Act).

Consideration 3(a) – reveal an individual's personal information

28. 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.

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

...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]

30. 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.
31. The Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act* in December 2011. 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.
32. In order to establish that this consideration applies, the Agency has to:
- a. identify whether the information is personal information; and
 - b. consider whether the information would be revealed by disclosing it under the GIPA Act.
33. The Council decided to release some personal information that related to the identity of the DA applicant to contextualise the decision being made and to promote transparency, and identify potential conflicts of interest.
34. In the course of this review we also undertook a search of readily available online material. Our examination of publicly available information indicated that the identity of the development applicant has already been publicly revealed.
35. We make no recommendations against the Council's decision to reveal the identity of the development applicant as it is apparent that the identity has already been revealed.
36. The Council provided the Applicant with a copy of redacted letters to and from those who had made objections to it about the proposed development. We have reviewed a copy of the redacted letters and it is apparent that the information that has been withheld relates to the names and addresses of those people who lodged an objection to the Council.
37. We are satisfied that the agency has justified its decision to the use of consideration 3(a).

38. We make no recommendations against the agency's decision.

Information held by Council and reasonable searches

39. In his request for external review by the Information Commissioner, the Applicant told us that "there does not appear to be a full effort by the person obtaining information for me to obtain the complete record as evidenced by the fact that I am advised that I should seek to find additional information from another part of council as the information was not on the files at the time of the request."

40. The expression 'government information' is given a wide meaning by section 4 of the GIPA Act which provides that it is 'information contained in a record held by an agency.' This is further defined in clause 12 of schedule 4 to the GIPA Act.

41. Section 53(2) of the GIPA Act sets out the requirement for agencies to conduct searches. It provides:

53 Searches for information held by agency

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.

42. The Council must comply with the requirements of section 53(2) of the GIPA Act before it can decide that it does not hold information. The requirements are:

- a. an agency must have undertaken such reasonable searches as necessary to locate the information requested; and
- b. must use the most efficient means reasonably available to the agency.

43. In *Smith v Commissioner of Police [2012] NSWADT 85*, Judicial Member Isenberg stated at paragraph 27:

In making a decision as to the sufficiency of an agency's search for documents which an applicant claims to exist, there are two questions:

- i. are there reasonable grounds to believe that the requested documents exist and are the documents of the agency; and if so,*
- ii. have the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of a particular case.*

44. Council's notice of decision dated 7 January 2016 detailed its searches undertaken to locate the information. It states that relevant documents were obtained from its electronic document management system and its hard copy file for DA2016.0022.

45. The Council also stated in its notice of decision the steps it took to also cross reference the paper file with the electronic file which resulted in additional records being located. Further the Council also included its notice of decision the search terms that it used to locate the information.

46. The basis that the Applicant queries the completeness of the searches for the information found is related to the location of the detailed plans for the development in DA 2016.0022. This appears to have been the subject of email communication after the notice of decision was provided in which we understand that the Council advised the Applicant that "there were no plans on

the files when your applications was processed” and that enquiries should be made to the planning staff.

47. We are not satisfied that the advice provided that no plans were on file at the time is reasonable. For the purposes of this review we undertook a review of the publicly available DA information about DA2016.0022 on the Council’s website.
48. From this information we understand that a Development Application was received by the Council in August 2015. It is reasonable to presume that at the time of the making of the development application, this would include the plans associated with the development whether subsequently varied. It is our view that it is reasonable to expect that a development application file would include such plans given the access application was made well after this date. For this reason we are satisfied that there are reasonable grounds to believe that such information would exist on the development application file.
49. We also made enquiries of Council about its searches. Council provided information to us relating to its how it manages access to plans subject to copyright infringement. We recognise the Council’s efforts to ensure that an infringement of copyright does not occur however this should not result in all information held by Council about a Development Application not being considered in the determination of an access application.
50. It is our view that when an access application is made, it is the responsibility of the Council and not an applicant, to undertake all reasonable searches to locate the information that is subject of the access request. This includes searching all business divisions within the Council.
51. We have considered the manner in which the search was conducted, the likelihood that records such as a development plan would exist and therefore are not satisfied that the searches conducted were adequate.
52. For this reason we recommend that the Council make a new decision by way of internal review. In making a new decision the Council should conduct searches of all areas within the Council and if such records or additional records were located, Council should then apply the public interest test to whether the information should be released.

Form of access

53. In their access application the Applicant requested that access be provided in a particular form, that is by inspection at the Evans Head Office. Council complied with this request and made its decision accordingly.
54. At the time of the inspection of the information, however, the Applicant sought to make copies of the information by taking photographs at the inspection. It appears from the information provided to us that the Council was not agreeable to this course of action however it did subsequently agree to the applicant taking photos. We note that these events all appear to have taken place after the notice of decision was given.
55. Notwithstanding that this was ultimately resolved at the time of the inspection, the Applicant has raised this issue as part of the external review to the Information Commissioner. On this basis we have considered this further as part of our external review.
56. The decision to provide access by inspection is in our view consistent with the request made by the Applicant at the time of their access application and there

was no information provided to us during the review that suggests that the Applicant altered his preference prior to the determination of the application.

57. Therefore the decision of the Council regarding the form of access complies with section 72 of the GIPA Act.
58. If an applicant seeks to alter the method to which access is to be provided then this should occur prior to the determination of an access application and not after. This is because agencies will make a decision about the manner in which access is to be provided to an applicant. Depending on the decision that is made agencies may need to turn its mind to other considerations including the imposition of processing charges consistent with the provisions of the GIPA Act and so on.
59. We make no recommendations against the Council's decision to provide access in the manner in which it did.

Recommendations

60. The Information Commissioner recommends under section 93 of the GIPA Act that agency make a new decision, by way of internal with respect to the information held in respect of DA2016:0022.
61. The Information Commissioner recommends under section 95 of the GIPA Act that agency review its decision making process for deciding access applications to ensure that access applications are decided within the statutory timeframes subject to any exceptions that may apply and communication with applicants is occurring where appropriate and the requirements for imposing processing charges.
62. In making a new decision, have regard to the matters raised and guidance given in this report.
63. We ask that the Agency advise the Applicant and us by **31 May 2016** of the actions to be taken in response to our recommendations.

Review rights

64. 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 NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.
65. The Applicant has the right to ask the NCAT to review the Agency's decision.
66. An application for a review by the NCAT 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
Administrative and Equal Opportunity Division
Level 10, John Maddison Tower
86-90 Goulburn Street,
Sydney NSW 2000

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

67. 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.

Completion of this review

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

Elizabeth Tydd
Information Commissioner