

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

Applicant: Applicant
 Agency: Waverley Council
 Report date: 27 May 2016
 IPC reference: IPC16/R000445
 Keywords: Government information – adequacy of notice of decision –
 justifying public interest considerations against disclosure

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Summary

1. Applicant (the Applicant) applied for information from Waverley Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. A Law Firm as delegate of the Agency, decided to provide access to some of the information, refuse to provide access to some of the information, and that some information was already available to the Applicant.
3. The Information Commissioner recommends that the Agency make a new decision by way of an internal review.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to information about an alleged incident and other associated information separated into eight parts:
 - 1) *All records provided by the Consulting Company to Waverley Municipal Council regarding investigation of allegations relating to the Applicant and an alleged incident on 20 April 2015 at the Office*
 - 2) *A copy of any complaints received by Council against the Applicant relating to the 20 April 2015 incident, copy of records on how they were received by Council and any communication between Council, Council Officers and the authors of the complaints.*
 - 3) *A copy of all statements obtained by Council in the course of investigating the complaint/allegations against the Applicant and the 20 April 2015 incident.*
 - 4) *A copy of all CCTV footage recorded on the day from any cameras that recorded the alleged incident on 20 April 2015.*
 - 5) *A copy of all email communications between Council Officers/Employees regarding the investigation and any email communication between Council Officers/Employees and external parties including the complaints and the Consulting Company.*
 - 6) *All emails, minutes, notes and correspondence relating to the incident, the allegations, the investigation, the disciplinary process and the appeal process regarding the Applicant.*
 - 7) *A copy of the Applicant's personnel file.*
 - 8) *A copy of all invoices from the Consulting Company for the undertaking of the investigation re incident on 20 April 2015.*
5. In its decision issued on 1 July 2016, a Law Firm, as delegate of the Agency, decided to provide access to some of the information, refuse to provide access to some of the information, and that some information was already available to the Applicant.
6. In seeking a review of the decision by the Information Commissioner, the Applicant pressed for access to the withheld information.

Decision under review

7. The decision under review is the Agency's decision to refuse to provide access to information in response to an access application.
8. This decision is a reviewable decision under section 80(d) of the GIPA Act.

The public interest test

9. According to section 9(1) of the GIPA Act, an access applicant has a legally enforceable right to access the information requested, unless there is an overriding public interest against disclosing the information. 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, the Agency must apply the public interest test and decide whether or not an overriding public interest against disclosure exists for the information.
12. 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.
13. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.
14. The IPC has developed a fact sheet that describes the public interest test which is available on our website: <http://www.ipc.nsw.gov.au/fact-sheet-what-public-interest-test>.

Public interest considerations in favour of disclosure

15. 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 (section 12(2) GIPA Act).
16. In its notice of decision, the Agency has not listed any public interest consideration in favour of disclosure of the information in issue.
17. The GIPA Act requires agencies to identify and consider relevant public interest considerations in favour of disclosure for conducting the public interest test. This is because conducting the public interest test requires agencies to weigh up and balance the public interests in favour and against disclosure.
18. As the Agency has not identified any public interest considerations in favour of disclosure, we are not satisfied that the Agency was able to adequately conduct the public interest test.

19. To assist the Agency, we suggest that it considers the following public interest considerations in favour of disclosure that may apply: promoting accountability in the Agency's decision making processes and openness and transparency in the Agency's operations, just to name a few.
20. The Agency is encouraged to consider any other relevant considerations and include them when conducting the public interest test.

Public interest considerations against disclosure

21. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
22. 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.
23. 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.
24. In its notice of decision the Agency raised nine public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
 - a. prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions (clause 1(d) of the table to section 14 of the GIPA Act);
 - b. reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency (clause 1(e) of the table to section 14 of the GIPA Act);
 - c. found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (clause 1(g) of the table to section 14 of the GIPA Act);
 - d. prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed) (clause 1(h) of the table to section 14 of the GIPA Act);
 - e. reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant (clause 2(a) of the table to section 14 of the GIPA Act);
 - f. prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law (clause 2(b) of the table to section 14 of the GIPA Act);
 - g. reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act);
 - h. 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); and

- i. expose a person to a risk of harm or of serious harassment or serious intimidation (clause 3(f) of the table to section 14 of the GIPA Act);
25. However, the notice of decision only reiterated the wording of these considerations and did not demonstrate how each of the identified considerations applies to the information over which it has been claimed. We note that the Agency applied the considerations to the eight categories of information identified in the Applicant's access request rather than any specific records located by the Agency as falling within these eight categories.
26. On that basis, we are not satisfied that the Agency's decision to refuse to provide access to the information is justified.
27. To assist the Agency to understand how to demonstrate each consideration, we have provided an outline of each consideration mentioned in the notice of decision below. We expect that when justifying the application of any public interest consideration against disclosure, notices of decision will clearly articulate how all the relevant factors apply to the information over which it has been claimed.
28. The NSW Civil and Administrative Tribunal (NCAT) and its predecessor the Administrative Decisions Tribunal have dealt with these considerations previously and guidance is provided within published decisions. The Agency may also wish to consider this guidance to better understand how the Tribunals have applied the considerations in their decisions.

Consideration 1(d) – supply of confidential information

29. Clause 1(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 the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions.
30. In order for this to be a relevant consideration against disclosure, the Agency must be satisfied that:
 - a. the information was obtained in confidence;
 - b. disclosure of the information could reasonably be expected to prejudice the supply of such information to the Agency in future; and
 - c. the information facilitates the effective exercise of the Agency's functions.
31. The notice of decision must demonstrate how the information for which the Agency has claimed this consideration was obtained in confidence. Following from this, the Agency must articulate the prejudice to the supply of confidential information that could reasonably be expected to occur if the information is disclosed.
32. We draw the Agency's attention to how the NCAT applied this consideration in the case of *Camilleri v Commissioner of Police (NSW) [2013] NSWADT 80*, which dealt with consideration 1(d) and concluded that a relevant test is whether an agency would be able to obtain confidential information in the future.

Consideration 1(e) – prejudice a deliberative process

33. Clause 1(e) 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 reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency (whether in a particular case or generally).*
34. In order for this consideration to apply, the Agency must establish that disclosing the information could reasonably be expected to 'reveal':
- a deliberation or consultation conducted; or
 - an opinion or recommendation;
 - in such a way as to prejudice a deliberative process of the agency.
35. The notice of decision should identify the specific deliberation or consultation conducted, or opinion or recommendation that would be revealed upon disclosure of the information.
36. Following this, the notice of decision needs to describe the prejudice (disadvantage or detriment) that disclosure of this information would have on the agency's deliberative process (whether in a particular case or generally).
37. This prejudice needs to be sufficiently linked to the information over which this consideration has been claimed, such that the prejudice could reasonably be expected to occur should that information be disclosed.

Consideration 1(g) – breach of confidence

38. Clause 1(g) 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 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).*
39. To show that this is a relevant consideration against disclosure, the Agency must establish:
- the information was obtained or produced in confidence; and
 - 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.
40. The notice of decision should establish that the information was obtained or produced in confidence. This may involve a description of the context and circumstances that gave rise to this confidentiality. The notice of decision then needs to articulate how disclosure would result in a breach of confidentiality or otherwise result in the disclosure of the provided information.

Consideration 1(h) – conduct of any audit, test, investigation or review

41. Clause 1(h) of the table at section 14 states:
- There is a public interest consideration against disclosure if disclosure of information could reasonably be expected to prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted*

by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).

42. To show that this is a relevant consideration against disclosure, the agency must establish:
 - a. the audit, test, investigation or review conducted (whether or not commenced and whether or not completed);
 - b. the purpose, conduct or results that would be revealed; and
 - c. the prejudice to the conduct, effectiveness or integrity of the audit, test, investigation or review resulting from the release of the information.
43. The notice of decision should identify the specific purpose, conduct or results that would be revealed upon disclosure of the information.
44. Following this, the notice of decision needs to describe the prejudice (disadvantage or detriment) that disclosure of this information would have on the effectiveness or integrity of any audit, test, investigation or review conducted (whether or not commenced and whether or not completed).
45. This prejudice needs to be sufficiently linked to the information over which this consideration has been claimed, such that the prejudice could reasonably be expected to occur should that information be disclosed.

Consideration 2(a) – reveal the identity of an informant

46. Clause 2(a) 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 reveal or tend to reveal the identity of an informant or prejudice the future supply of information from an informant.
47. In order for this to be a relevant consideration against disclosure, the Agency must be satisfied that:
 - a. the information reveals or could be used to ascertain the identify of an informant; or
 - b. the information's release would prejudice the future supply of information from an informant.
48. The term 'informant' is not defined in the GIPA Act. In *NSW Office of Liquor, Gaming and Racing v Fahey [2012] NSWADTAP 55*, the Tribunal held that an informant is "a person who gives information".
49. For this to be a relevant consideration against disclosure, the Agency need only establish one of the limbs it contains not both.

Consideration 2(b) – contravention of law

50. Clause 2(b) of the table at section 14 states:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law
51. The notice of decision should establish the prejudice (disadvantage or detriment) that disclosure of this information would have on the agency's

prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law. This may involve a description of the specific law that is or may be breached.

52. The prejudice needs to be sufficiently linked to the information over which this consideration has been claimed, such that the prejudice may reasonably occur should that information be disclosed.

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

53. Clause 3(a) of the table at section 14 of the GIPA Act 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.

54. Therefore, in order to establish that this consideration applies, the Agency has to:

- a. identify whether the information is personal information (defined in clause 4(1) of Schedule 4); and
- b. consider whether the information would be revealed by disclosing it under the GIPA Act (defined in clause 1 of Schedule 4).

55. Agencies must also have regard to the Information Commissioner’s *Guideline 4 – Personal information as a public interest consideration under the GIPA Act* in accordance with section 15(b) of the GIPA Act.

56. The notice of decision should establish that the withheld information is personal information of other people and articulate how disclosure of that information could reasonably be expected to reveal those individuals’ personal information. This involves a consideration of whether that information has already been revealed.

57. We note that if the withheld information contains the Applicant’s own personal information we are not of the view that this consideration applies to that information. This is because the Applicant’s personal information is information already known to the Applicant and so it would not be revealed to them through disclosure.

58. We remind the Agency that an individual’s personal information includes not only their own opinions of others but also other people’s opinion of that individual which enable that individual’s identity to be reasonably ascertainable.

59. Lastly, section 54 of the GIPA Act requires agencies to consult with third parties before providing access to information relating to those third parties in certain circumstances. Consultation assists agencies to decide how much weight to attribute to this consideration when conducting the public interest test.

Consideration 3(b) – contravene an information protection principle

60. Clause 3(b) of the table at section 14 of the GIPA Act states:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to contravene an information protection principle under the Privacy and Personal Information Act 1998 or Health Privacy Principle under the Health Records and Information Privacy Act 2002.

61. The notice of decision should identify the exact information protection principle or health privacy principle that could reasonably be expected to be contravened and describe how release of the information would cause the expected contravention to occur.

Consideration 3(f) – expose a person to a risk of harm

62. Clause 3(f) 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 expose a person to a risk of harm or of serious harassment or serious intimidation.

63. In the context of the GIPA Act, ‘harm’, ‘serious harassment’ and ‘serious intimidation’ requires an objective assessment of the impact of the conduct on the individual concerned.

64. In *AEZ v Commissioner of Police* (2013) NSWADT 90, the NCAT provided:

Harm should be confined to a real and substantial detrimental effect on a person... A detrimental effect may be to a person's physical, psychological or emotional wellbeing.

The requirement that the intimidation or harassment be serious means the decision maker must be satisfied that release of the government held information may reasonably be expected to expose the person to intimidation or harassment that is weighty or grave and not trifling or transient.

65. The notice of decision needs to establish on what basis a risk of harm, serious harassment or serious intimidation would reasonably be expected to occur if the information was disclosed. This may require a description of the context or environment that may give rise to this.

66. Agencies will then need to objectively consider whether the severity or level of the consequences has reached the requisite degree required in the consideration. This assessment will need to be articulated in the notice of decision.

Personal factors of an applicant

67. Under section 55 of the GIPA Act, agencies are able to take into consideration personal factors of the Applicant to inform their decision as to whether there is an overriding public interest against disclosure.

68. Personal factors of an applicant include their identity and relationship with any other person, motives for making the access application and any other factor particular to them.

69. We draw the Agency's attention to how personal factors of the Applicant may be taken into account as factors in favour of providing the application with access to information and as factors against providing access to information in certain circumstances.

70. The Agency may wish to consider how personal factors of the Applicant may be relevant in its consideration of whether there is an overriding public interest against disclosure of the information.

Notices of decision

71. We note the requirement in section 61(c) of the GIPA Act that requires notices of decision to contain a description of the general nature and format of the refused records held by the agency that relates to the Applicant's access request.

72. We observed that the notice of decision did not contain a schedule of documents or any other descriptor of what records were found to fall within the scope of the access request.
73. Although a schedule of documents is not strictly a legal requirement, we consider that it is good practice for agencies to provide such a schedule accompanying their notices of decision. This is so that agencies can fulfil their obligation under section 61(c) of the GIPA Act and assist applicants to understand what information has been located by the agency and the decision made with respect to that information.
74. A schedule of documents also provides a good reference point for any further discussion arising from an agency's decision and assists any future reviewer in identifying the decision that was made about the information.

Recommendations

75. The Information Commissioner recommends, under section 93 of the GIPA Act, that the Agency make a new decision by way of an internal review.
76. In making a new decision, have regard to the matters raised and guidance given in this report.
77. We ask that the Agency advise the Applicant and us **within 10 business days** of the actions to be taken in response to our recommendations.

Review rights

78. 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 NCAT for a review of that decision.
79. The Applicant has the right to ask the NCAT to review the Agency's decision.
80. 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>
81. 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

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

Elizabeth Tydd
Information Commissioner