



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

Applicant:	Ms Helen McLennan
Agency:	University of New England
OIC reference:	11-260
Date review request received:	12 August 2011
Date of this report:	14 May 2012

Summary of this report

1. Ms Helen McLennan, of the National Tertiary Education Union (**NTEU**)'s University of New England (**the University**) branch made an access application to the University on 23 May 2011 requesting the salaries, KPIs and bonuses of the University's Senior Executive Staff, Directors and Heads of School for 2010 and 2011.
2. The University refused access to the majority of the requested information as it determined there was an overriding public interest against disclosure. Further, some of the information was identified as already being available in the University's 2010 Annual Report.
3. We reviewed the University's notice of decision and its GIPA file, as well as submissions made by Ms McLennan concerning the University's decision to refuse access.
4. We recommend that the University make a new decision regarding the access application and disclose the information (excluding the contracts) requested by Ms McLennan.
5. Ms McLennan has indicated that she is not pressing for the university staff's contracts and will be satisfied with the release of the salaries, Key Performance Indicators (KPIs) and bonuses of the University staff listed in her access application.
6. Further details and our reasons for these recommendations are set out below.

Background

7. On 23 May 2011, Ms McLennan made a formal access application to the University requesting the following:

Contracts, key performance indicators and bonuses or if contracts are exempt, salaries, key performance indicators and bonuses for the following positions at UNE:

Vice Chancellor, Chief Governance and Planning Officer, Chief Operating Officer, DVC Research, Chief Development Officer, PVC/Dean Arts and Sciences, PVC/Dean the Professions, PVC Students and Social Inclusion, Executive Director of Infrastructure, and of all Directors of Administrative Units and Heads of Schools.

8. In its notice of decision of 30 June 2011, the University refused release of the information as it determined there was an overriding public interest against its disclosure. It also decided that some of the requested information was already available to Ms McLennan, however provided the available information to her in an attachment to the notice of decision.

Our review

9. We received Ms McLennan's request to review the University's decision on 12 August 2011, which is a reviewable decision under section 80(d) of the GIPA Act.
10. In conducting our review, we considered the University's notice of decision dated 30 June 2011 and its GIPA file. We also considered Ms McLennan's submissions to us.
11. The University has grouped the requested information into the following three sections (all three sections have been addressed in this report):
 - a. Salaries, KPIs and bonuses of the University's senior executive staff for 2010;
 - b. Salaries, KPIs and bonuses of the University's senior executive staff for 2011; and
 - c. Salaries, KPIs and bonuses of the University's Directors and Heads of School for 2010 and 2011.

The public interest test

12. 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.
13. 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.

14. When applying the public interest test, the University should begin with the presumption in favour of disclosure of government information provided for at section 5 of the GIPA Act.
15. The University must then:
 - a. identify further public interest considerations in favour of disclosure;
 - b. identify the relevant public interest considerations against disclosure;
 - c. determine the weight of the public interest considerations in favour of and against disclosure; and
 - d. decide where the balance between those interests lies.
16. In applying the public interest test, the University must also follow the principles outlined in section 15 of the GIPA Act.

Public interest considerations in favour of disclosure

17. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information. This consideration must always be weighed in the application of the public interest test. The nature and scope of other public interest considerations in favour of disclosure, which may be relevant in the application of the public interest test, are not prescribed (section 12(2) GIPA Act).
18. In its notice of decision, the University did not outline or explain any public interest factors in favour of release.
19. The notes to section 12(2) of the GIPA Act set out some examples of public interest considerations in favour of disclosure. We consider the following public interest considerations are relevant considerations in this application:
 - 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;
 - b. disclosure of the information could reasonably be expected to inform the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public; and
 - c. disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.
20. The personal factors of the application may be relevant considerations in balancing the public interest test, including in favour of disclosure (section 55 of the GIPA Act). Personal factors which may be taken into account include:
 - the applicant's identity and relationship with any other person;
 - the applicant's motives for making the access application; and
 - any other facts particular to the applicant.

Public interest considerations against disclosure

21. The only public interest considerations against disclosure which may be considered in the application of the public interest test are those set out in the table to section 14 of the GIPA Act. To raise these as relevant considerations in the application of the public interest test the agency must establish that the disclosure of the information "...could reasonably be expected to havethe effect" outlined in the table.
22. The University provided one public interest consideration against disclosure from the table at section 14 of the GIPA Act, which provides that there is a public interest consideration against disclosure and information if it could be reasonably expected to:
 - a. Clause 3(a) - reveal an individual's personal information.

Salaries, KPIs and bonuses of the University's Senior Executive Staff for 2011

Individual rights, judicial processes and natural justice- clause 3(a) of the table to section 14 of the GIPA Act

23. The University refused to release the requested information to Ms McLennan on the basis that it had received legal advice that this information contained an individual's personal information and determined there was an overriding public interest against its disclosure.
24. It then provided further reasoning against disclosure by stating that some of this information (being the salaries, KPIs and bonuses of the university's senior executive staff for 2011) would eventually be published in the 2011 University's Annual Report and so there was no particular public interest consideration in favour of disclosure of the information before then.
25. We are not satisfied that this is a correct application of this consideration. The University states there was an overriding public interest against disclosure as the requested information was determined to be personal information, however it then indicated that the requested information would be available at a later time in its 2011 Annual Report. This is a clear contradiction from its initial consideration that there is a public interest against disclosure.
26. We think that another relevant public interest factor against disclosure that the University could have considered in these circumstances is clause 4(d) of the table to section 14.

Business interests of agencies and other persons- clause 4(d) of the table to section 4

27. Clause 4(d) states:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice any person's legitimate business, commercial, professional or financial interests.
28. As Ms McLennan is requesting the salaries, KPIs and bonuses of individual university staff, this could potentially disadvantage them in their ability to negotiate future employment contracts.

29. We also think the information is of a kind that requires consultation as it concerns the University staff's professional and financial interests and so the University needs to undertake consultation with them in accordance with section 54(2) of the GIPA Act.

Consultation on public interest considerations- section 54

30. We note that paragraph 2 of the University's notice of decision indicates that it consulted third parties. In fact, the University advises that the determination date of the access application was extended by 10 working days for this very reason, that is, it needed additional time to undertake third party consultation.
31. Nevertheless, there is no reference or discussion again throughout the remainder of the notice of decision regarding third party consultation.
32. It is unclear whether the determination to refuse disclosure was due to the University's consideration of clause 3(a) of the table to section 14 or that the information sought would eventually be available at a later date. Should it be the latter, the University should have regard to section 78 of the GIPA Act, which provides for deferral of access to information.

Deferral of access- section 78

33. The University has advised that some of the requested information (salaries, KPIs and bonuses of the university's senior executive staff for 2011) will be available in its 2011 Annual Report. If this is the case, the University is able to postpone access until this report is published, presented or submitted but must advise Ms McLennan in its notice of decision that access will be deferred and provide a date on which the information will be provided (section 78(1) to section 78(3) of the GIPA Act).
34. If access to the information is deferred for a period of more than twelve months, the University must also allow Ms McLennan to make another access application for the information, however, it cannot charge any further application or processing fees (section 78(4) of the GIPA Act).

Salaries, KPIs and bonuses of the University's Senior Executive Staff for 2010

Decision that information already available to applicant - section 59 of the GIPA Act

35. The University claimed that some of the requested information (salaries, KPIs and bonuses of the University's senior executive staff for 2010) was already available in its 2010 Annual Report (section 59(1) of the GIPA Act). Thus the University refused access to it but advised Ms McLennan that the information could be accessed (under section 59(2) of the GIPA Act) on its website.
36. Ms McLennan, however, submits that all the information that the University claimed was accessible was not actually contained in the 2010 Annual Report. Ms McLennan specifically mentions that there was no discussion in the report about the KPIs of each university staff and that only a summary of the KPIs was presented.
37. We have reviewed the 2010 Annual Report and confirm that the total remuneration package, including performance pay of the following senior university executives have been detailed in the report:

- a. Vice-Chancellor;

- b. Chief Development Officer;
- c. PVC & Dean (The Professions Faculty);
- d. Chief Governance & Planning Officer & Legal Counsel;
- e. PVC (Students and Social Inclusion);
- f. Executive Director Infrastructure;
- g. PVC & Dean (Arts & Science Faculty);
- h. Chief Operating Officer; and
- i. PVC (Research).

38. However, we agree with Ms McLennan that there is only a general summary of the KPIs in the report and no further details are provided as to how the university staff members fulfilled their KPIs.

Salaries, KPIs and bonuses of the University's Directors and Heads of School for 2010 and 2011

39. The University decided not to disclose the salaries, KPIs and bonuses of the University's Directors and Heads of Schools for 2010 and 2011 as it determined this information was an individual's personal information (under clause 3(a) of the table to section 14) and thus was an overriding public interest against its release as these university staff members were not considered to be part of the senior executive staff.
40. Our view is that when the University is considering whether any public interest factors against disclosure apply in these circumstances, the more relevant clause to contemplate is clause 4(d) of the table to section 14, as discussed above.
41. We also refer the University to the case of *Re National Tertiary Education Industry Union (Murdoch Branch) and Murdoch University; Ors* [2001] WAICmr 2 (2 January 2001), in which the Western Australian Information Commissioner decided that the disclosure of the total remuneration of senior officers, including Divisional heads, of Murdoch University would, on balance, be a public interest consideration in favour of disclosure.
42. Contrary to the University's decision not to release the salary information of the University's Directors and Heads of School, the above case supports the disclosure of this information.

Balancing the public interest test

43. The GIPA Act does not provide a set formula for working out the weight of public considerations for or against disclosure or deciding if one set of considerations outweighs the other.
44. Whatever approach is taken, this 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).

45. In the past, tribunals and Information Commissioners have supported the public interest consideration in favour of disclosure of the remuneration of senior public officers, including university staff (Examples include *Re Asher and Department of State and Regional Development* [2002] VCAT 609 (6 August 2002) and *Re Stewart and Department of Transport* [1993] QICmr 6 (9 December 1993)).
46. Amendments have also been made to the *Annual Reports (Statutory Bodies) Regulation* 2010, which now require universities to publish a detailed breakdown of salary packages and performance bonuses paid to its executives (in particular clause 11(3)).
47. Further, in its 2008-2009 Annual Report, the NSW Ombudsman also made the following comment about the performance and pay of university staff:

The annual reporting requirements relating to the disclosure of performance pay and performance assessments of senior staff in the public sector were introduced to ensure there is accountability and transparency in the use of public funds... [T]he performance and pay of senior university executives should be similarly open to public scrutiny.
48. The University, in its notice of decision, determines there is an overriding public interest against disclosure, however provides no explanation as to how it came to this decision. There is also an absence of public interest considerations in favour of disclosure, suggesting there was no weighing up undertaken of public interest considerations for and against disclosure and therefore, no proper application of the test.

Our recommendations

49. We recommend that the University reconsider its original decision and make a new decision to release the requested information (excluding the contracts) under section 94 of the GIPA Act.
50. In its new decision, we recommend the University include a discussion about deferral of the salaries, KPIs and bonuses of the University's Senior Executive Staff for 2011 in accordance with section 78 of the GIPA Act.
51. We ask that the University advise Ms McLennan and us by **21 May 2012** of the actions it intends to take in response to our recommendations.

Review rights

52. 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.
53. Ms McLennan may ask the ADT to review the original decision of the agency if she is dissatisfied with:
 - a. our recommendations, or
 - b. the University's response to the recommendations,
54. Ms McLennan may ask the ADT to review the original decision of the agency.

55. 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.

56. 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

57. If the University makes a new reviewable decision as a result of our review, Ms McLennan 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 OIC or ADT.

Closing our file

58. This review is now closed.

59. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.

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