



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

Applicant: Mr Jon Hallam
Respondent: Clarence Valley Council
Report date: 8 November 2013
IPC reference: IPC12/R000150
Catchwords: Government information – public interest test – personal
information – contravene an Information Protection Principle –
false or unsubstantiated allegations - defamation
Government information – access refused

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Summary

1. Mr Hallam applied to Clarence Valley Council (the Council) under the *Government Information (Public Access) Act 2009* (GIPA Act) for access to specific information.
2. The Council decided to not disclose the information to Mr Hallam.
3. The Information Commissioner makes the following recommendations in relation to the Council's decision:
 - a. pursuant to section 93 of the GIPA Act, the Council make a new decision, by way of internal review within 15 working days of this report (subject to any extensions available in the GIPA Act).
 - b. pursuant to section 95 of the GIPA Act, the Council revise its procedures for information access requests so that future notices of decision comply with the requirements of section 61 of the GIPA Act.

Background

4. On 29 October 2012, Mr Hallam applied under the GIPA Act to the Council for access to the final investigation report into allegations of misconduct against him (Mr Hallam).
5. In its decision issued on 30 November 2012, the Council decided to not disclose the report to Mr Hallam.
6. In seeking a review of the decision by the Information Commissioner, Mr Hallam confirmed that he was seeking access to the report.

Decisions under review

7. The decision under review is the Council's decision to not disclose the report to Mr Hallam.

The public interest test

8. Mr Hallam 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.
9. 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.
10. Before deciding whether to release or withhold information, the Council must apply the public interest test and decide whether or not an overriding public interest against disclosure exists for the information.
11. 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.
12. The Council 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

13. 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 Council may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).
14. In its notice of decision, the Council did not identify any public interest considerations in favour of disclosure.
15. The effect of this on the decision making process, especially the application of the public interest test, is discussed later in this report.

Public interest considerations against disclosure

16. 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 Council must establish that the disclosure of the information *could reasonably be expected to have the effect* outlined in the table.
17. 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.
18. Public interest considerations are made up of elements and certain elements are given meaning in Schedule 4 to the GIPA Act. For a public interest consideration against disclosure to apply in the public interest test each element must be satisfied. If any element of a public interest consideration against disclosure is not met, the public interest consideration cannot be considered when applying the public interest test.
19. In its notice of decision the Council raised three public interest considerations against disclosure. Those considerations are that the disclosure of the report could reasonably be expected to:
- a. reveal false or unsubstantiated allegations about a person that are defamatory (clause 3(e) of the table to section 14 of the GIPA Act);
 - b. reveal personal information (clause 3(a) of the table to section 14 of the GIPA Act); and
 - c. contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* (clause 3(b) of the table to section 14 of the GIPA Act).
20. Point a was identified by its legislative reference in the notice of decision. Points b and c were not cited by their legislative reference and were discussed together rather than as separate considerations in the notice of decision. Each of these considerations is discussed in turn.

Consideration 3(e) – reveal false or unsubstantiated allegations about a person that are defamatory

21. Clause 3(e) 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 false or unsubstantiated allegations about a person that are defamatory.
22. In order to establish that this consideration applies, the Council must satisfy each element of the consideration. The elements are:
 - a. that the disclosure of the report would reveal information;
 - b. that the information revealed contains false or unsubstantiated allegations about a person; and
 - c. those false or unsubstantiated allegations about a person are defamatory
23. When addressing the first element the Council should be mindful of the definitions of 'reveal' and 'government information' in the GIPA Act. The issue for the Council is not whether the report (a written document) has already been revealed, but whether information in any form contained in the report has already been revealed or is otherwise available. If information from the report has already been revealed or is otherwise available it cannot be revealed by the disclosure of the report and therefore the first element cannot be satisfied. The Council's notice of decision does not address the issue of whether any of the information in the report has already been revealed.
24. When addressing the second element the Council must identify the information that contains allegations against a person and demonstrate that those allegations are either false or unsubstantiated. The Council engaged an independent consultant to undertake an investigation and prepare a report. It is clear from the context of the notice of decision that the investigation is into an allegation that Mr Hallam engaged in corrupt behaviour. The notice of decision states that 'the report does not make findings of corrupt conduct'. This indicates that the report may contain allegations that were not substantiated. However, the Council has not identified which information in the report is subject to the consideration.
25. In its notice of decision the Council did not explain how the allegations against a person are defamatory and therefore have not adequately addressed the third element. In order to satisfy the third element the Council must consider the allegations according to the general principles of defamation law and determine whether the allegations are defamatory. If the Council determines that the allegations are not defamatory then the third element of the consideration cannot be satisfied. The reasoning for this determination should be included in the notice of decision.

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

26. The notice of decision implicitly discusses clause 3(a) of the table at section 14 without citing the legislative reference. 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.
27. 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]
28. 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.
29. 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.
30. In order to establish that this consideration applies, the Council 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.
31. In its notice of decision the Council identifies people’s addresses and contact details, information about people’s families and opinions as personal information contained in the report.
32. The notice of decision does not demonstrate that the Council considered whether the information would be revealed if the report was disclosed. Similar to the element of revealing information under clause 3(e) of the table at section 14, this requires the Council to consider whether the information has already been revealed or is otherwise available before determining that it would be revealed if the report were disclosed.
33. The considerations in the table to section 14 of the GIPA Act may be applied in the public interest test, but they do not operate as exemptions. Council has not explained why the weight of this consideration outweighs the considerations in favour of disclosure. It is unlikely that this consideration will apply to all of the information in the report.
34. Pursuant to section 74 of the GIPA Act, the Council can consider deleting personal information from a copy of the report in order to provide the other information in the report to Mr Hallam.

Consideration 3(b) – contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998*

35. The notice of decision implicitly discusses clause 3(b) of the table at section 14 without citing the legislative reference. Clause 3(b) of the table at section 14 as a public interest consideration against disclosure states:

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

36. In order for this to be a relevant consideration against disclosure, the Council must be satisfied that:
- a. there is an applicable Information Protection Principle (IPP) in the *Privacy and Personal Information Protection Act 1998* (the PPIP Act); and
 - b. that a breach of the applicable IPP would occur if information was disclosed.
37. In its notice of decision the Council identifies IPP 11 (section 18 of the PPIP Act) as the relevant IPP. The Council also gave a brief analysis of the exemptions to the IPP at sub sections 18(1)(a), (b) and (c) and explanation about why they do not apply in this case.
38. However, the Council does not appear to have fully considered whether a breach would occur under IPP 11 if the information was disclosed. IPP 11 applies only to personal information therefore it is possible to release information that is not personal information without breaching IPP 11. A potential breach of IPP 11 cannot be used to refuse disclosure of information that is not personal information. Therefore to correctly apply clause 3(b) of the table at section 14 of the GIPA Act the Council should limit its consideration of IPP 11 to only personal information contained in the report. To avoid breaching IPP 11 while also providing access to the report, the Council may wish to consider deleting personal information from the report pursuant to section 74 of the GIPA Act.
39. As noted above, the notice of decision implicitly discusses clauses 3(a) and (b) of the table at section 14 without citing the legislative references. It is not immediately clear what clauses and considerations are being discussed in the notice. It is also noted that the discussion of these clauses is not clearly delineated and it is not clear where the discussion of one clause ends and where the other begins. While the two clauses deal with similar issues and content they are separate clauses. They should be clearly identified and discussed separately in the notice of decision.

Other considerations noted in the notice of decision

40. In the notice of decision the Council also relied on two other considerations against disclosure. They are:
- a. That the report does not make findings of corrupt conduct; and
 - b. The report does not outline conduct that could be considered to be significant enough to amount to favour the release of the information in the interests of the public or a right for the public to know under the terms of Section 12 of the GIPA Act.

41. Section 14(2) of the GIPA Act establishes that the only public interest considerations against disclosure that can be taken into account when applying the public interest test are those listed in the table to section 14. Neither of these is a public interest consideration contained in the table to section 14 of the GIPA Act. Therefore they are not valid public interest considerations against disclosure and cannot be taken into account when applying the public interest test.
42. The fact that the report does not make findings of corrupt conduct could be taken into account when assessing the public interest consideration at clause 3(e) of the table at section 14. But it is not a public interest consideration in its own right.
43. Section 14(1) of the GIPA Act establishes a conclusive presumption against disclosure of information if the information is of a kind described in Schedule 1 to the GIPA Act. The information in question is not of a kind described in Schedule 1 to the GIPA Act.

Notices of decisions

44. The GIPA Act does not provide a set formula for weighing individual public interest considerations or assessing their comparative weight. Whatever approach is taken, these questions may be characterised as questions of fact and degree to which different answers may be given without being wrong, provided that the decision-maker acts in good faith and makes a decision available under the GIPA Act.
45. Agencies should:
 - set out the considerations in favour of disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;
 - set out the considerations against disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;
 - make a decision about which way the balance lies, in light of the weight in favour and against
46. If at this stage the agency considers that there is an overriding public interest against disclosing the information, the GIPA Act contains a number of provisions that may apply to mitigate the effect of, or reduce the weight of, public interest considerations against disclosure or even avoid an overriding public interest consideration against disclosure altogether. These provisions are found in sections 72 to 78 of the GIPA Act.
47. It is consistent with the objects of the GIPA Act that these provisions be considered, where relevant, before a decision is made to not disclose information because there is an overriding public interest consideration against disclosure.
48. Once all of the above steps have been finalised, an agency should explain its reasons for the decision to the applicant. If the agency decides that there is an overriding public interest against disclosing the information its notice of decision must meet the notice requirements in section 61 of the GIPA Act.
49. Section 61 of the GIPA Act provides that when an agency refuses to provide access to information because there is an overriding public interest against disclosure, its notice of decision must include the following:

- the reasons for its decision to refuse access;
 - the findings on any key questions of fact, and the source of the information on which the findings are based; and
 - the general nature and format of the records that contain the information sought.
50. Each notice must meet the requirements prescribed by section 126 of the GIPA Act:
- it must be in writing;
 - it must include the date of the decision;
 - it must include a statement of the review rights attached to the agency's decision, including details of the time period within which the review rights must be exercised;
 - it must include the contact details of an officer to whom inquiries about the decision can be directed; and
 - it must not disclose information for which there is an overriding public interest against disclosure.

Findings

51. I find that the Council has not satisfied its obligation under section 97(1) of the GIPA Act because it has not justified its decision to not disclose the information requested by Mr Hallam.
52. In summary the Council has not correctly applied the public interest test found at section 13 of the GIPA Act and therefore has not justified its decision because it:
- a. did not demonstrate that it weighed the public interest considerations for and against disclosure of the information. The Council's notice of decision does not identify any public interest considerations in favour of disclosure or provide any explanation of how the public interest considerations for and against disclosure were weighed in order to reach the decision.
 - b. relied on considerations that are not valid public interest considerations against disclosure under section 14 of the GIPA Act when applying the public interest test.
 - c. did not demonstrate that each element of the public interest considerations against disclosure had been satisfied and therefore it cannot rely on them.
 - d. did not demonstrate that each public interest consideration against disclosure that it relied upon applies to all of the withheld information.

Recommendations

53. Pursuant to section 93 of the GIPA Act, the Information Commissioner recommends that the Council make a new decision in regards to Mr Hallam's request for access to information, by way of internal review within 15 working days of this report (subject to any extensions available in the GIPA Act).
54. Pursuant to section 95 of the GIPA Act, the Information Commissioner recommends that the Council revise its procedures for information access

requests so that future notices of decision comply with the requirements of section 61 of the GIPA Act.

55. In making a new decision, the Council should have regard to the matters raised and guidance given in this report.
56. We ask that the Council advise Mr Hallam and us by **22 November 2013** of the actions to be taken in response to our recommendations.

Review rights

57. 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.
58. If Mr Hallam is dissatisfied with our recommendations or the Council's response to our recommendations, he may ask the ADT to review the Council's decision
59. 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. The ADT's contact details are:

Administrative Decisions Tribunal
Level 10, 86 Goulburn Street,
Sydney, NSW, 2000

Phone: (02) 9377 5711

Facsimile: (02) 9377 5723

Website: <http://www.lawlink.nsw.gov.au/adt>

Email: ag_adt@agd.nsw.gov.au

60. If the Council makes a new reviewable decision as a result of our review, Mr Hallam 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 ADT.

Closing our file

61. This file is now closed.
62. If you have any questions please contact our office on 1800 472 679.