



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

Applicant: Ian Scandrett
Respondent: Wingecarribee Shire Council
Decision date: 29 August 2013
Application number: IPC13/R00002
Catchwords: Government information – public interest test – personal information – prejudice supply of confidential information – reveal a deliberative process – prejudice the effective exercise of agency’s function – found an action for breach of confidence
Government information – whether information already available

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Summary

1. Mr Scandrett applied for information from the Wingecarribee Shire Council (the Council) under the *Government Information (Public Access) Act 2009 (GIPA Act)* for access to specific information.
2. The Council provided access to some information with redactions and decided that other information was already available to Mr Scandrett.
3. The Information Commissioner makes the following recommendations in relation to the Council's decision:
 - a. pursuant to section 94 of the GIPA Act, the Information Commissioner recommends against the Council's decision that there is an overriding public interest against disclosure of the redacted salary information requested,
 - b. pursuant to section 93 of the GIPA Act, the Information Commissioner recommends that the agency make a new decision by way of internal review (within 15 working days).

Background

4. On 28 February 2012, Mr Scandrett applied under the GIPA Act to Wingecarribee Shire Council for access to the following documents:
 - a. employment contracts for (3) Directors that were in force in 2010.
 - b. employment contracts for (3) Directors that were signed in 2011.
 - c. employment contracts for the new Deputy General Manager's with Performance Criteria.
 - d. employment contracts for the General Manager with Performance Criteria etc.
 - e. the General Manager's performance report 2011.
5. In its original decision issued on 29 March 2012, the Council refused to provide the information to Mr Scandrett.
6. Following a review by our office (the previous reference for that review is IPC12-0238), the Council conducted an internal review of the original decision.
7. After the internal review, the Council decided to
 - a. provide access to the information requested in paragraph 4(a) to (c) above with the personal address and salary package information redacted,
 - b. not release the information requested in paragraph 4(d) and (e) above in reliance on section 59(1)(b) of the GIPA Act.
8. In seeking a review of the internal review decision by the Information Commissioner, Mr Scandrett confirmed that he is not seeking release of the personal address information redacted from the documents described in paragraph 4(a) to (c) above. He is however seeking access to the remaining redacted information, being the salary packaging information in those documents and the information not released as described in paragraph 4(d) and (e) above.

Decisions under review

9. The two decisions under review are the Council's decisions to:
 - a. redact the salary package information from the employment contracts described in paragraph 4(a) to (c) above,
 - b. not release the information in paragraph 4(d) and (e) in reliance on section 59(1)(b) of the GIPA Act.

The Public Interest Test

10. Mr Scandrett 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.
11. 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.
12. 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.
13. The NSW Administrative Decisions Tribunal (**ADT**)¹ has outlined that the test in 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.
14. 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

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 Council may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).
16. In its notice of decision, the Council listed the following public interest considerations in favour of disclosure of the information in issue:
 - a. there is a presumption in favour of disclosure,
 - b. the directors in question were employed by the Council at the expense of ratepayers and in the service of ratepayers of the Shire,

¹ *Nature Conservation Council of NSW v Department of Trade and Investment, Regional Infrastructure and Services* [2012] NSWADT 195 at [29]

- c. the objectives and performance expectations of the directors, as outlined in their contracts, was likely to have an impact on the delivery of services by Council to the public.
17. Each of these considerations was strongly weighted by the Council in its consideration of the public interest test.
18. The Information Commissioner is satisfied that the above public interest considerations in favour of disclosure apply to the information in issue, and that the agency correctly considered them in its decision. However, the Information Commissioner also considers that the remuneration of public officials should more broadly be regarded as having a strong public interest in favour of disclosure of information that shows how public funds are spent.
19. The redacted information sought is the remuneration of the directors of the Council as identified in paragraph 4(a)-(c) above. The Directors are persons engaged in a public function who should be accountable and responsible to the public. This issue has been recognised as a relevant consideration in favour of disclosure of the salary and conditions of employment of officials paid from the public purse.
20. In *Lower Burdekin Newspaper Company Pty Ltd and Lower Burdekin Shire Council* [2004] QICmr 2 (24 February 2004) [27] Queensland Information Commissioner Sorenson observed:

Information about the gross salary paid to an employee of a government agency has a dual character. It is both information about the income of an identifiable individual (and hence information concerning that individual's personal affairs) and information about the cost of having the duties of the relevant position performed for the benefit of the public. Governments fund their operations by imposts on the public of one kind or another. In a representative democracy, elected representatives are accountable to the electors for decisions made in respect of raising and spending public funds. The public has a strong, legitimate and abiding interest in having access to sufficient information to enable scrutiny of whether funds raised by government are expended efficiently and effectively in furtherance of the wider public interest. This extends to scrutiny of whether the public is obtaining value for money from performance of the duties of particular positions for which a government has decided to allocate funding. This public interest is even stronger in the case of senior officers who have responsibility for devising and/or implementing strategic and operational plans, and delivering key performance outcomes.

I consider that there is a strong public interest consideration favouring disclosure to any interested member of the public, of information as to the total cost in salary and related expenses of any job for which a government decides to allocate funding, and that it is even stronger in the case of senior management positions of the kind under consideration in the present case.

21. The present case is analogous with *Lower Burdekin* as the information sought relates to the salary of public officials. The position outlined in *Lower Burdekin*

has been accepted in the ADT², particularly that there is a strong public interest in how public funds are spent.

Public interest considerations against disclosure

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 Council 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. In considering what these words mean, the Courts³ have stated that the words “require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous” to expect the effect outlined.
24. In its notice of decision the Council raised five public interest considerations against disclosure of the salary package 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, whether in a particular case or generally (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 any agency, whether in a particular case or generally (clause 1(e) of the table to section 14 of the GIPA Act);
 - c. Prejudice the effective exercise by an agency of the agency’s functions (clause 1(f) of the table to section 14 of the GIPA Act);
 - d. 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 (clause 1(g) of the table to section 14 of the GIPA Act); and
 - e. reveal an individual’s personal information (clause 3(a) of the table to section 14 of the GIPA Act).
25. The Council concluded in its internal review with respect to the salary information (and the address information):

... the release salary... component of the contracts is considered on balance to be against the public interest, as the salary data in general terms is available in the Council’s annual reports, and the release of individual salary data encompasses problems, personal to the directors, that are not outweighed by the public interest considerations in favour of disclosure. [sic]
26. I will discuss each of these considerations in turn.

² *Clarke v Blackburn City Council* [2013] NSWADT 36

³ *Attorney-General’s Department v Coickcroft* (1986) 10 FCR 180. Cited with approval in the ADT in *Hurst v Wagga Wagga City Council* [2011] NSWADT 307

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

27. 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.
28. 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]
29. 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.
30. 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. Specifically, the Guideline notes that employment information, including details of salaries is personal information.
31. In order to establish that this consideration applies, the Council has to:
 - a. identify whether the information is personal information,
 - b. consider whether the information would be revealed by disclosing it under the GIPA Act.
32. The Council, in its Notice of Decision, identifies the salary package information as personal information of those individuals to whom the individual contracts relate.
33. The Council also says that such information is generally considered to be private as between the individual and their manager although it notes that the salary information in general terms is available in the Council’s Annual Report.
34. I have reviewed the salary information published in the Council’s Annual Reports and note the following:
 - a. 2009/2010 – outlined the total salary for the General Manager and a total combined salary figure for the three directors.
 - b. 2010/2011 - outlined the total salary for the General Manager and a total combined salary figure for the three directors.
 - c. 2011/2012 – outlined the total amount paid to all senior staff members and noted that there had been a turnover of three staff during the reporting period.
35. The information redacted from each of the documents are as follows:
 - a. for the documents described in paragraph 4(a) above, the total remuneration is redacted as well as the value of the components comprising the total remuneration amount, being salary, vehicle information (included in a schedule to the contracts) and superannuation.

- b. for the document described in paragraph 4(b) above, the total remuneration is redacted as well as the value of the components comprising the total remuneration amount, being salary, vehicle information and superannuation.
 - c. for the documents described in paragraph 4(c) above, the total remuneration is redacted as well as the value of the components comprising the total remuneration amount, being salary, vehicle information and superannuation.
36. While the Council has weighted this consideration highly, it has not demonstrated the weight by showing the effect of release of the information, such as the prejudice or harm that would result.
37. While we are satisfied that the salary information is personal information, we are not satisfied that there is an overriding public interest against disclosure of the information. This view is based on the considerations in favour of disclosure, outlined above, which in our view outweigh the public interest consideration against disclosure.

Consultation with the Privacy Commissioner

38. In accordance with section 94(2) of the GIPA Act, we consulted with the Privacy Commissioner before we decided to recommend against the Council's decision that there is an overriding public interest against disclosure of the salary information.
39. The Privacy Commissioner told us that she does not consider there to be an overriding public interest against disclosing the salary information in this case because of the seniority of the public officials involved as well as the salary information being broadly available in the Council's Annual Reports.

Consideration 1(d) - Prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency functions

40. 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 (whether in a particular case or generally).*
41. In order for this to be a relevant consideration against disclosure, the Council 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 Council in future; and
 - c. the information facilitates the effective exercise of the Council's functions.
42. Although the GIPA Act does not use the phrase "future supply", the nature of the prejudice that this consideration deems to be contrary to the public interest, is implicit. This future effect is one aspect of the abstract nature of the enquiry. The other abstract element is supply in a general sense and whether disclosure will impact supply of similar information by persons to the agency in the future.
43. It is commonly understood that information will have a confidential quality if the person was not bound to disclose the information but did so on the basis of an

express or inferred understanding that the information would be kept confidential.

44. The Notice of Decision says that the confidential information in the employment contracts was obtained from the directors (or individual's the subject of the employment contracts). However, this cannot relate to the salary information which is generally not information obtained from an employee but set by the employer organisation, sometimes by negotiation.
45. The Council has not provided details in its notice of decision of how the disclosure of the salary information withheld could reasonably be expected to prejudice the supply of evidence from third parties.

Consideration 1(e) - Reveal a deliberation or consultation conducted, or an opinion or recommendation given, in such a way as to prejudice a deliberative process of government or an agency.

46. 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).

47. In order for clause 1(e) to apply, the Council must establish that disclosing the salary package information could reasonably be expected to 'reveal':
 - (a) a deliberation or consultation conducted; or
 - (b) an opinion or recommendation;
 - (c) in such a way as to prejudice a deliberative process of the Council.

48. The term 'reveal' is defined in schedule 4, clause 1 of the GIPA Act to mean:

To disclose information that has not already been publicly disclosed (otherwise than by lawful means).

49. The issue to be addressed in the Notice of Decision is whether there is more than a mere possibility that releasing the salary package information would disclose any opinions or recommendations that would be detrimental to, or disadvantage, the Council's deliberative, that is, its decision-making process.
50. The Notice of Decision does not address this issue. The Council says that the deliberative process effected is its deliberations regarding employment of staff. It is not clear from the Notice of Decision how release of the salary information would reveal the deliberative process.

Consideration 1(f) - prejudice the effective exercise by an agency of the agency's functions

51. Clause 1(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 prejudice the effective exercise by an agency of the agency's functions

52. To show that this is a relevant consideration against disclosure, the Council must establish:
 - a. the relevant function of the agency;

- b. that is or would be prejudiced by release of the information.
53. The meaning of the word prejudice has been considered by the ADT and found to mean, to “cause detriment or disadvantage”⁴.
54. The Council has not identified the relevant function or what prejudice would be suffered by release of the redacted salary information.

Consideration 1(g) - Found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence

55. 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).*
56. To show that this is a relevant consideration against disclosure, the Council must establish:
- a. the information was obtained in confidence; and
 - b. disclosure of the information could reasonably be expected to found an action against an agency for breach of confidence; or
 - c. otherwise result in the disclosure of information provided.
57. In raising this public interest consideration against disclosure the Council needs to ensure the information is in fact confidential.
58. The question of whether information is confidential information has been considered by the ADT Appeal Panel which said that the “‘confidential information’ must be examined, primarily at least, by reference to the agency’s evidence as to the conditions under which it conducts the service within which the information was received”⁵. The Appeal Panel went on to comment that “the enquiry... should focus on the point of receipt, and the administrative standards and community understandings which surrounded it”⁶.
59. Once satisfied that the information is confidential information, the Council should then turn its mind to what constitutes a breach of confidence. A breach of confidence arises out of an unauthorised disclosure of, or other use of information, which is subject to an obligation of confidentiality.
60. The Council has not established that the salary information is confidential. Rather it says that the information contained in the employment contracts was supplied by the individual directors. As I have said above, the salary information cannot be said to have been provided by the employees themselves.

⁴ *Hurst v Wagga Wagga City Council* [2011] NSWADT 307 at [60]

⁵ *Commissioner of Police, NSW Police Force v Camilleri* (GD) [2012] NSWADTAP 19 at [33]

⁶ At [34]

Information already available

61. The Council has decided that the information described at paragraph 4(d) and (e) above is already available. It relies on section 59(1)(b) of the GIPA Act.
62. Section 59 of the GIPA Act says:
- (1) *An agency can decide that information is already available to an applicant only if the information is:*
 - (a) *made publicly available by the agency or some other agency in accordance with a legislative instrument other than this Act, whether or not availability of the information is by inspection only and whether or not availability is subject to a charge, or*
 - (b) *available to the applicant from, or for inspection at, the agency free of charge in accordance with this Act or the agency's policies and practices, or*
 - (c) *contained in a document that is usually available for purchase.*
 - (2) *An agency is not required to provide access to information that the agency has decided is already available to the applicant, but notice of the decision must indicate how the information can be accessed by the applicant.*
63. The Council says that due to his position on the Council's General Manager Performance Review Committee, the information sought in paragraph 4(d) and (e) above is "freely accessible" to Mr Scandrett pursuant to the Council's Access to Information Policy.
64. The Council's Access to Information Policy, available on its website, deals with applications under the GIPA Act as well as identifying the documents that are considered open access information under the GIPA Act.
65. The Council has not said in its Notice of Decision how the information described in paragraph 4(d) or 4(e) fits into the category of documents that are publically available, or how Mr Scandrett's position on the Council's committee makes the documents publically available. Further, section 59(2) requires the Notice of Decision to indicate how the information can be accessed by an applicant. Other than referring to its policy and Mr Scandrett's position on the Council's committee, the Council has not done so.
66. Mr Scandrett's ability to access information in a professional capacity does not authorise him to use that information outside of the capacity in which he obtained access to the particular information. That is, a professional context. Under the GIPA Act, access provided to information is unconditional, and an agency cannot place any limitations on its use⁷. This is important in the context of a section 59(1)(b) decision that the information is already available
67. Section 59(1)(b) of the GIPA Act provides that an agency can decide that information is already available to an applicant only if the information is

⁷ Section 73

available to the applicant from, or for inspection at, the agency free of charge in accordance with this Act or the agency's policies and practices.

68. When reading section 59(1)(b) in light of and with regard to the surrounding provisions and the object of the GIPA Act, we are of the view that 'already available' means that the information is of a kind that, prior to the receipt of the access application, has already been designated as information that is already available by some other means.
69. Section 59(1) operates to promote the public interest in providing affordable and efficient access to government information by enabling an agency to identify information that is already available to an applicant and therefore does not need to be processed formally, potentially at a higher cost to the applicant.
70. If Mr Scandrett were to put in an informal request in place of a formal access application, Council would still need to apply the public interest test to the information before releasing it to him. Alternatively, Council could decide not to deal with the informal application, or could place conditions around Mr Scandrett's use of the information.
71. Further, Mr Scandrett would not have review rights attached to his informal application. We therefore do not agree that it is appropriate for Council to use section 59(1) to avoid dealing with that part of the request formally. Mr Scandrett has chosen to make a formal access application, with review rights, and Council is obligated to deal with that application.
72. We recommend that Council reconsider its decision that the information is already available and apply the public interest test. If Council then decides that there is an overriding public interest against disclosure of the report to Council, it should consider the appropriate provisions set out in the GIPA Act regarding how access is provided (see sections 72(1) & 72(2)(d), 73(2), 74, 75, 76 and 78), to avoid an overriding public interest against disclosure.

Recommendations

73. The Information Commissioner recommends against the Council's decision with respect to the redacted salary information (set out in paragraphs 4(a)-(c) above) pursuant to section 94 of the GIPA Act.
74. The Information Commissioner recommends under section 93 of the GIPA Act that the Council make a new decision, by way of internal review within 15 working days.
75. In making a new decision, have regard to the matters raised and guidance given in this report.
76. We ask that the Council advise Mr Scandrett and us by **12 September 2013** of the actions to be taken in response to our recommendations.

Review rights

77. 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.
78. If Mr Scandrett is dissatisfied with our recommendations or the Council's response to our recommendations, Mr Scandrett may ask the ADT to review the Council's decision

79. 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

80. If the Council makes a new reviewable decision as a result of our review, Mr Scandrett 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

81. This file is now closed.
82. If you have any questions in relation to this report please contact the IPC on 1800 472 679.