

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

Applicant: Mr Francis McGill  
Agency: Great Lakes Council  
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Keywords: Government information – secrecy provisions of other legislation –  
public interest test - personal factors of application

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## Summary

1. Mr Francis McGill (the Applicant) applied for information from the Great Lakes Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to provide access to some information and refuse access to some information. The Agency also concluded that some information was destroyed in a fire and therefore is not able to be considered as part of the application.
3. The Information Commissioner makes the following recommendations in relation to the Agency's decision:
  - a. pursuant to section 93 of the GIPA Act, the Agency reconsider the decision by way of internal review and make a new decision as if the decision reviewed had not been made.

## Background

4. On 4 December 2012, the Applicant applied under the GIPA Act to the Agency for access to six items of information. In the notice of decision the six items are refined and described in more detail so that they are specific to the issues the Applicant is interested in. All the information relates to Agency meetings and documents tabled at those meetings. Below is the list of documents as specified in the notice of decision:
  - a. Ordinary Meeting of the Great Lakes Council held on 13 November 1979
    - i. Shire Clerk's Report titled 'Staff Housing' being pages 68 & 69 of the Minutes of this meeting.
    - ii. Council resolution number 1209 in relation to this matter being page 9 of the Minutes of this meeting.
  - b. Staff and Management Meeting of Great Lakes Council held on 13 November 1979
    - i. Shire Clerk's Report to Council's Staff and Management Meeting – Item 2 titled 'Engineer's Clerk – Mr F McGill (S11/-)' being pages 1, 3 and 4 of the Minutes to this meeting.
    - ii. Minutes of the Ordinary Meeting of Great Lakes Council held on 13 November 1979 being pages 14 and 15 reporting and adopting the recommendations from the Staff and Management Meeting held on the same date.
  - c. Staff and Management Meeting of Great Lakes Council held on 23 April 1985
    - i. Shire President's report to the Staff and Management Committee Meeting titled 'Complaint by Mr F McGill' being pages 1 and 2 of the Minutes of this meeting.
    - ii. Minutes of the Ordinary Meeting of Great Lakes Council held on 23 April 1985 being page 7 reporting and adopting the recommendation from the Staff and Management Meeting held on the same date.
  - d. Staff and Management Meeting of Great Lakes Council held on 23 May 1985
    - i. Letter from the Department of Local Government to Great Lakes Council mentioned in the above Staff and Management Meeting.
  - e. Staff and Management Meeting of Great Lakes Council held on 12 February 1980
    - i. Shire Clerk's Report to the Staff and Management Committee Meetings titled 'Engineer's Clerk – Mr F McGill' being pages 1, 2 and 4 of the Minutes to this meeting.
    - ii. Minutes of the Ordinary Meeting of Great Lakes Shire Council held on 12 February 1980 being pages 1, 11 and 12 reporting and adopting the recommendations from the Staff and Management meetings held on the same date.

- f. Ordinary Meeting of Stroud Shire Council held on 12 January 1971
  - i. Shire Clerk's Report titled 'Provision of Additional Housing at Stroud and Forster' being pages 5, 38 and 39 of Minutes of the meeting.
- 5. In its notice of decision issued on 7 January 2013, the Agency decided the following:
  - a. to provide access to items a(i) and (ii), b(ii), c(ii), e(ii) and f(i)
  - b. item d had been destroyed in a fire in June 1988
  - c. to refuse access to items b(i), c(i) and e(i)
- 6. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that he is seeking access to the information the Agency refused him access to.

### **Decisions under review**

- 7. The three decisions under review are the Agency's decisions to refuse access to items b(i), c(i) and e(i).
- 8. The material examined for the purposes of this review is:
  - a. the Agency's notice of decision
  - b. the application for access to information
  - c. relevant legislation
  - d. information provided by the parties

### **The public interest test**

- 9. The Applicant has a legally enforceable right to access the information requested, unless there is an overriding public interest against disclosing the information (section 9(1) of the GIPA Act). The public interest balancing test for determining whether there is an overriding public interest against disclosure is set out in section 13 of the GIPA Act.
- 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.

### **Public interest considerations in favour of disclosure**

- 14. 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 (s12(2) GIPA Act).
- 15. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue, being that disclosure may:
  - a. assist the Agency being held accountable by the public,
  - b. contribute to positive and informed debate on an issue,

- c. enhance the public understanding of the circumstances of an issue,
  - d. contribute to the administration of justice generally, and
  - e. reveal the reason for an Agency decision and any background or contextual information that informed that decision.
16. The Agency did not list any personal factors of the application as considerations in favour of disclosing the information. Consideration of personal factors in favour of consideration is allowed, but not required, under section 55(2) of the GIPA Act.
  17. The personal factors allowed to be considered are listed in section 55(1) of the GIPA Act which relevantly says:
    - (1)... an agency is entitled to take the following factors... into account as provided by this section:
      - (a) the applicant's identity and relationship with any other person,
      - (b) the applicant's motives for making the access application,
      - (c) any other factors particular to the applicant.
  18. The information the Applicant seeks access to directly references him and relates to his interactions with the Agency. These personal factors might have impacted on the weighing of the public interest test.

### **Public interest considerations against disclosure**

19. 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.
20. 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.
21. In its notice of decision the Agency raised one public interest consideration against disclosure of the information, deciding that its release could reasonably be expected to constitute a contravention of a provision of any other Act or statutory rule that prohibits the disclosure of information (clause 6 of the table to section 14 of the GIPA Act);

### **Consideration 6 – Secrecy provisions**

22. Clause 6 of the table at section 14 states:
  - (1) There is a public interest consideration against disclosure of information if disclosure of the information by any person could (disregarding the operation of this Act) reasonably be expected to constitute a contravention of a provision of any other Act or statutory rule (of this or another State or of the Commonwealth) that prohibits the disclosure of information, whether or not the prohibition is subject to specified qualifications or exceptions.
  - (2) The public interest consideration under this clause extends to consideration of the policy that underlies the prohibition against disclosure.
23. In order for this consideration to apply the Agency must establish that there is an Act or statutory rule that prohibits the disclosure of the information.
24. In the notice of decision the Agency acknowledged that the information the Applicant seeks access to was created when the *Local Government Act 1919* (LG Act 1919) was in force. When the LG Act 1919 was repealed the *Local Government Act 1993* (LG Act 1993) came in to force.
25. The Agency asserts that the savings and transitional provisions involved in the repeal of the LG Act 1919 and the commencement of the LG Act 1993 mean that the secrecy provisions of the LG Act 1993 apply to the information.

26. For secrecy provisions to apply in this specific circumstance the Agency must demonstrate two things. First that the information was subject to the secrecy provisions of the LG Act 1919. Second that the information is subject to the secrecy provisions of the LG Act 1993.
27. The Agency cites sections 10A and 664 of the LG Act 1993 as applying in this instance.
28. Subsection 664(1A) of the LG Act 1993 says:

**664 Disclosure and misuse of information**

...

(1A) In particular, if part of a meeting of a council or a committee of a council is closed to the public in accordance with section 10A (1), a person must not, without the authority of the council or the committee, disclose (otherwise than to the council or a councillor of the council) information with respect to the discussion at, or the business of, the meeting.

29. Section 10A of the LG Act 1993 relevantly says:

**Which parts of a meeting can be closed to the public?**

(1) A council, or a committee of the council of which all the members are councillors, may close to the public so much of its meeting as comprises:

- (a) the discussion of any of the matters listed in subclause (2), or
- (b) the receipt or discussion of any of the information so listed.

30. Subclause 10A(2) of the LG Act 1993 lists nine types of matters and information that provide the opportunity for a meeting to be closed to the public.
31. The Agency asserts that the information was 'confidential' and discussed at or created for a 'closed meeting'. A closed meeting is a meeting of a Council Committee that is closed to the public. In the course of the review the Agency provided us with the information withheld from the Applicant. We have reviewed the information and are satisfied that on face value the information is of a kind that is subject to the secrecy provisions of the relevant legislation.

### **Application of the public interest test**

32. In the notice of decision the Agency concludes:

Given that Council (the Agency) has not determined that this information can be released and to do so may constitute an offence under the Act, I am of the opinion that the public interest against disclosure outweighs those in favour of disclosure for those three items.

This reasoning is problematic for two reasons.

33. First, the Agency has not demonstrated that it has attributed weight to each public interest consideration, both for and against disclosure, and then determined where the balance lies. There is no explanation of why the Agency finds that the factors against disclosure outweigh those in favour, only an assertion that this is the case.
34. Second, with specific reference to the public interest consideration against disclosure, while the Agency has established that the consideration applies it does not appear to have adjusted the weight of the consideration by considering section 11 of the GIPA Act. Section 11 of the GIPA Act states that the GIPA Act overrides the secrecy provision in other legislation unless that legislation is listed in Schedule 1 of the GIPA Act. The LG Act 1993 is not listed in Schedule 1 of the GIPA Act. Therefore it is open for the Agency to decide to disclose the information subject to the balancing of public interest considerations for and against disclosure.

## Our findings

35. We are not satisfied the Agency correctly applied the public interest test because it did not demonstrate that it attributed weight to each public interest consideration so that they could be weighed and determine where the balance lies.

## Recommendations

36. The Information Commissioner recommends that:
  - a. the Agency reconsider the decision by way of internal review and make a new decision as if the decision reviewed had not been made, pursuant to section 93 of the GIPA Act.
37. We ask that the Agency advise the Applicant and us by **7 January 2014** of the actions to be taken in response to our recommendations.

## Review rights

38. 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.
39. If the Applicant is dissatisfied with our recommendations or the Agency's response to our recommendations, the Applicant may ask the ADT to review the Agency's decision.
40. 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>
41. 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 ADT.

## Closing our file

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