



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

Applicant: John N Mallon
Agency: Cowra Shire Council
Report date: 23 October 2015
IPC reference: IPC15/R000392
Keywords: Government information – decision to provide access to part of the information requested – information not held – information searches

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Summary

1. Mr John N Mallon (the Applicant) applied for information from the Cowra Shire Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to provide access to some of the information sought, and decided that the rest of the information is not held by the Agency.
3. The Information Commissioner is not satisfied that:
 - the notice of decision demonstrates that the public interest test was applied in the way required by the GIPA Act, and
 - the Agency's decision that information is not held is justified.
4. Although an explanation is provided for the decision to provide access to some information, the notice of decision:
 - does not identify any public interest considerations against disclosure, or refer to any public interest considerations in favour of disclosure, other than the presumption in favour of the disclosure of government information in section 5 of the GIPA Act, and
 - does not show how the considerations for disclosure, on balance, outweigh those against disclosure.
5. The Information Commissioner makes the following recommendations in relation to the Agency's decision:
 - a. Pursuant to section 93 of the GIPA Act, that the Agency make a new decision by way of internal review (within 15 working days), and
 - b. Pursuant to section 95 of the GIPA Act, that the Agency adopts the guidance provided in this report in dealing with future access applications.

Background

6. On 17 June 2015 the Applicant applied under the GIPA Act to the Agency for access to five (5) items of information, in the following terms:
 - i. *In relation to minute 154/13- Cr Walsh and Miller - Require copy of map charting "Option 3" Southern Ring Road from the GHD final report on the preferred route for a heavy vehicle bypass.*
 - ii. *Require copy of the report directed to be prepared by the Director of Infrastructure and Operations on the process to implement recommendation I including investigation into the viability of alleviating concerns of affected residents – as from minute 154/13.*
 - iii. *In the context of minute 154/13 - Require definition of terminology "alleviating concerns" and "affected residents" and if the category "affected residents" includes John and Peter MALLON.*
 - iv. *Require copy of directions from Council to consultant who "developed" the terminology "sensitive resources" as appended to several properties at the Western extremity of Woodstock village in "Map 3 Constraints, not to scale, in document "Land Use Strategy LEP Justification Report" April 2012, Page 173 and 174 and evidence of overall approval and endorsement by Director-General Haddad of the document.*

- v. *Require to be advised of the number of hours necessary to complete contractual arrangements for the contract drawn with “CMC sweeping solutions (minute 300/13) and the cost associated with those negotiations and the subsequent negotiations to terminate the contract.*
7. In its decision issued on 3 July 2015, the Agency decided to:
 - provide access to information (request items i, ii and part of iv), and that
 - some information is not held by the Agency (request items iii, iv and v).
8. In seeking a review of the decision by the Information Commissioner, the Applicant asserts that:
 - the full intention of his requests have not been adequately considered, and
 - the Agency conducted searches and provided information based on an incorrect interpretation of request item ii.

Decisions under review

9. The two decisions under review are the Agency’s decisions to:
 - a. Provide access to information (request items i, ii and part of iv), and that
 - b. Information is not held by the Agency (request items iii, iv and v).
10. These are reviewable decisions under section 80(d) and section 80(e) of the GIPA Act.
11. In accordance with section 97 of the GIPA Act, in this review the Agency bears the burden of establishing that its decision is justified.
12. In this review we have taken into account information provided by both the Applicant and the Agency.

The public interest test

13. 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.
14. 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.
15. 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.
16. 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.

17. 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

18. 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).
19. In its notice of decision, the Agency did not list any public interest considerations in favour of disclosure of the information, other than a reference to the presumption in favour of the disclosure of government information in section 5 of the GIPA Act:

... Under section 5 of the GIPA Act, there is a presumption in favour of disclosing government information.
20. The notice of decision omits the full provision under section 5 of the GIPA Act:

*There is a presumption in favour of the disclosure of government information **unless there is an overriding public interest against disclosure.***
21. Section 12(2) of the GIPA Act provides there is no limit to the public interest considerations in favour of the disclosure of government information that may be taken into account.
22. We refer the Agency to the examples at section 12(2) of the GIPA Act, such as that disclosure of the information sought in request items i and ii could reasonably be expected to promote open discussion of public affairs, enhance Government accountability and contribute to positive and informed debate on issues of public importance.
23. The Information Commissioner recommends that in reconsidering its decision, the Agency identify any other relevant considerations in favour of disclosure and explain why the considerations apply to the information sought.

Public interest considerations against disclosure

24. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
25. 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.
26. 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.
27. In its notice of decision the Agency did not raise any public interest considerations against disclosure of the information.
28. The Information Commissioner recommends that in reconsidering its decision, the Agency identify any relevant considerations against disclosure of each of the request items. If there are none, the notice of decision should state that there are no relevant considerations against disclosure.

Balancing the public interest

29. 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.
30. The Information Commissioner recommends that in reconsidering its decision, the Agency:
 - Address each request item individually;
 - Indicate whether any information exists relating to the request item or confirm if information does not exist;
 - 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; and
 - Make a decision about which way the balance lies, in light of the weight in favour of and against disclosure of the information.
31. 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 (see for example, sections 72 to 78 of the GIPA Act).
32. 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 against disclosure.
33. The Information Commissioner recommends that once all of the above steps have been finalised, the Agency 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.

Decision that information is not held by the Agency

34. The notice of decision states that request items iii, iv and v are not held by the Agency.
35. The Agency provided the following reasons for its decision that information relating to request items iii, iv and v are not held:
 - iii. *GIPA legislation defines government information as “information contained in a record held by an agency – section 4”. As such, I advise that Council [the Agency] holds no such records.*
 - iv. *The Cowra Shire Land-use Strategy LEP Justification Report was prepared by Council in the Environmental Services Department and without assistance from an external consultant. In this regard, there were no directions from Council to a Consultant in relation to the terminology “sensitive resources”.*

- v. *GIPA legislation defines government information as “information contained in a record held by an agency – section 4”. As such, I advise that Council [the Agency] holds no such records.*
36. Before deciding that it does not hold information, the Agency must comply with the requirements of section 53(2) of the Act. The requirements are:
- undertake such reasonable searches as necessary to locate the information requested; and
 - use the most efficient means reasonably available to the Agency. We refer the Agency to our fact sheet on reasonable searches for further information.
37. In *Smith v Commissioner of Police [2012] NSWADT 85*, Judicial Member Isenberg said at paragraph 27:
- In making a decision as to the sufficiency of an agency’s search for documents which an applicant claims to exist, there are two questions:*
- (a) are there reasonable grounds to believe that the requested documents exist and are the documents of the agency; and if so,*
- (b) have the search efforts made by the agency to locate such documents been reasonable in all the circumstances of a particular case.*
38. When considering whether there are reasonable grounds to believe that information exists and whether the searches to locate information were reasonable, the facts, circumstances and context of the application is relevant. Key factors in making an assessment about reasonable searches include “the clarity of the request, the way the Agency’s recordkeeping system is organised and the ability to retrieve any documents that are the subject of the request, by reference to the identifiers supplied by the applicant or those that can be inferred reasonably by the Agency from any other information supplied by the applicant” (*Miriani v Commissioner of Police, NSW Police Force [2005] NSWADT 187* at [30]).
39. The GIPA Act does not require the Agency to include details of its searches in a notice of decision. However, it is good practice for written decisions to clearly explain what the search processes were, what was found, an explanation if no records were found, what was released and what was held back. Details of searches should include where and how the Agency searched, a list of any records found – and if appropriate a reference to the business centre holding the records, the key words used to search digital records (including alternative spellings used) and a description of the paper records that were searched.
40. In relation to its searches for information, the notice of decision states:
- A search of [the Agency’s] records was conducted in relation to your request for information.*
41. In seeking a review of the decision, the Applicant also asserts that the full intention of his requests have not been adequately considered:
- The so-called “summaries” of my application are just a convenient paraphrase of name and minimise the thrust of my intended purpose.*
42. In relation to request items iii and v, the notice of decision does not provide an explanation as to how the definition of government information under section 4(1) of the GIPA Act relates to its decision that the information is not held by the Agency, or explain why the information is not provided.

43. Further, the notice of decision does not provide details about the searches undertaken for the information sought.
44. During the course of this review, the Agency provided details relating to its searches for information; stating that it:
 - searched its electronic records,
 - searched Dataworks, its electronic records management system which acts as a primary, central repository of shared information within the Agency, and
 - confirmed that the information is sought is not held by searching via individual key words found in each of the request items, including “option 3, southern ring road, ghd, heavy metal vehicle bypass, map, director, infrastructure and operations, minutes council, minute 154/13, general committee 2014”.
45. We are satisfied that the searches undertaken by the Agency to locate the information requested were reasonable and that the Agency used the most efficient means reasonably available to the Agency, for the following reasons:
 - The notice of decision acknowledges which request items were found and released, and which request items are not held, and
 - The details provided by the Agency as part of this review:
 - sufficiently describes the search processes undertaken by the Agency,
 - acknowledges what was released and what was held back, and
 - explains why information is not held (ie, searches yielded no result).
46. However, in reconsidering its decision and for future access applications, the Information Commissioner recommends that the notice of decision:
 - a. Include more detail in order to justify a decision that information is not held, and
 - b. set out the Applicant’s requests as listed in the access application, rather than summarising them.
47. We remind the Agency that it is also good practice to clarify any unclear or ambiguous request items with the Applicant prior to conducting searches for the information and prior to making a decision on an access application.
48. In seeking a review of the decision, the Applicant also asserts that the Agency conducted searches and provided information based on an incorrect interpretation of request item ii:

... I request a review of matter no “2” seeking a copy of investigations into the viability (NOT VALIDITY) of alleviating concerns of affected residents ie, to be advised whether or not the furnished report includes a clause required by minute 154/13 to alleviate the concerns of affected residents and of course, who in fact are “affected residents” in the context of the minute 154/13.
49. In relation to request item ii, the notice of decision states that the Applicant sought the following information:

*Recommendation 154/13 – Copy of Director – Infrastructure report on the process to implement recommendation I including investigation into the **validity** of alleviating concerns of affected residents.*

50. The notice of decision states the following information was provided to the Applicant in response to request item ii:

Copy of report presented to councillors at the General Committee meeting on 10 February 2014 – Items I from the Director of Infrastructure and Operations as contained in the Business Papers for that meeting is attached.

51. During the course of this review, the Agency provided a copy of the document which was released to the Applicant in response to request item ii titled:

Director – Infrastructure & Operations Report to the General Committee Meeting to be held on Monday 10 February 2014.

52. The abovementioned document outlines the planning process for the implementation of a bypass in the Cowra area, known as the Cowra Bypass Project. The document is authored by the Director – Infrastructure & Operations and is dated 29 January 2013.

53. On the face of it, request item ii indicates that the Applicant sought a record prepared by a particular staff member of the Agency which includes an “*investigation into the viability of alleviating concerns of affected residents – as from minute 154/13*”.

54. The document provided to the Applicant in response to request item ii appears to satisfy the request as it includes information about community consultation already conducted and their intention to further engage with the community to finalise the implementation phase of the Project:

...It is now appropriate to engage in selected consultation with affected residents [which] will be required as part of the planning stage. Consultation would include individuals and groups with special interest such as the local Aboriginal Community...Concerns raised by the public at meetings last year in July and August will be addressed in the appropriate planning document”.

55. However, as noted by the Applicant, the notice of decision describes the document as including an investigation into the ‘*validity*’ as opposed to the ‘*viability*’ of such an investigation.
56. The Information Commissioner recommends that in reconsidering its decision and in dealing with future access applications, the Agency’s decision-maker ensures that the notice of decision accurately reflects the information sought by the Applicant as well as the information found as result of the searches undertaken.

Notices of decisions

57. To assist the Agency in drafting notices of decisions, we include some additional guidance, below.
58. When making a decision about an access application, the Agency must issue a notice of decision that meets 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.
59. The Agency, having applied the public interest test under section 13 of the GIPA Act, must include detailed reasons if it decides not to release information in response to a formal access application.
60. 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.
61. We advise that as good practice, a notice of decision for access applications should include:
- details of the searches conducted by the Agency to locate the information asked for;
 - the reasons for the Agency's decision to withhold the information including:
 - public interest considerations in favour of disclosure and why the Agency considers them relevant to the information sought;
 - public interest considerations against disclosure and why the Agency considers them relevant to the information sought; and
 - the Agency's decision after balancing the public interest considerations for and against disclosure;
 - details of relevant consultations made as required under section 54 of the GIPA Act;
 - details of any personal factors of the application under section 55 of the GIPA Act that the Agency has taken into account in making its decision;
 - details about the access period (under section 77 of the GIPA Act) and forms of access to any information released under the Agency's notice of decision;
 - details about whether any processing charges will be payable for access to the information and how those charges have been calculated (as required by section 62 of the GIPA Act);
 - whether the Agency will record details about the access application in its disclosure log (as required by sections 25 and 26 of the GIPA Act); and
 - where relevant, a schedule of documents itemising the documents falling within the scope of the access application, including a description

of the record, location of the record within the Agency, format of the record, public interest considerations in favour of, or against disclosure, the corresponding GIPA Act sections for any such considerations, and whether the information was released.

Recommendations

62. The Information Commissioner recommends under section 93 of the GIPA Act that the Agency make a new decision, by way of an internal review.
- In making a new decision, the Agency should have regard to the matters raised and guidance given in this report.
 - We ask that the Agency advise the Applicant and us of any actions to be taken in response to our recommendation within **10 working days** of the date of this report.
63. The Information Commissioner recommends under section 95 of the GIPA Act that the Agency adopt the guidance provided in this report in dealing with future access applications.

Review rights

64. 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 NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.
65. The Applicant has the right to ask the NCAT to review the Agency's decision.
66. 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>
67. 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

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

Elizabeth Tydd
Information Commissioner