

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

Applicant: The Applicant
Agency: Wyong Shire Council
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public interest test – forms of access – reasonable searches

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Summary

1. The Applicant applied for information from the Wyong Shire Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to provide access to some information in full (including two by inspection for two items) and to refuse access to some information.
3. The Information Commissioner makes the following recommendation, under section 93 of the GIPA Act, in relation to the Agency's decision:
 - a. that the Agency reconsider its decision in relation to items 34, 52 and 53, by way of internal review; and
 - b. that the Agency reconsider its decision about the form of access that items 35 and 51 are provided in.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to the following information:
 - a. correspondence on file for two specific matters (a development application and a complying development certificate); and
 - b. plans (including but not limited to floor plans, elevations, site plans and site analysis) in relation to the same development application and complying development certificate as requested in paragraph a above.
5. The Applicant requested the information in electronic form.
6. In its decision issued on 9 October 2014, the Agency identified 53 items of information that fall within the scope of the application and decided to:
 - a. provide access to 48 items in full;
 - b. provide access to two items by inspection; and
 - c. refuse access to three items in full.
7. The schedule of documents attached to the notice of decision lists the decisions made in relation to each of the 53 items of information.
8. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that he seeks access to the information that he was denied access to and that he wishes to receive copies of documents to which he was previously allowed to inspect.
9. The Applicant also stated that he believes information exists and is held by the Agency but was not identified by the Agency when it processed the application.

Decisions under review

10. The decisions under review are the Agency's decisions to:
 - a. to refuse access to some information in full, and
 - b. to provide access to some information in a form other than that requested by the Applicant.
11. These are reviewable decisions under section 80(d) and 80(i) of the GIPA Act.
12. The adequacy of the Agency's searches for information is also examined in this report.

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 listed the following public interest considerations in favour of disclosure:
 - a. the presumption in favour of disclosing information under section 5 of the GIPA Act;
 - b. the general public interest in favour of the disclosure of information held by the Agency; and
 - c. the Applicant's motive for requesting access to the information being that he sought access to information regarding a property development of a neighbouring property that could affect him.
20. These appear to be appropriate considerations for this application. However, in his application for external review the Applicant raised concerns about the Agency's conduct in assessing the development application and complying development certificate that are the subject of the review. Therefore some of the example considerations listed in the notes to section 12 of the GIPA Act, such as points (a) and (b), might also be relevant to the application.

Public interest considerations against disclosure

21. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
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 Agency 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. 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.
24. 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 expose a person to a risk of (clause 3(f) of the table to section 14 of the GIPA Act). This is discussed below.

Consideration 3(f) – expose a person to a risk of harm or serious harassment or serious intimidation

25. Clause 3(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... expose a person to a risk of harm or of serious harassment or serious intimidation.
26. To show that this is a relevant consideration against disclosure, the Agency must establish that each element of the consideration is satisfied. This involves an objective consideration of the severity or level of the consequences that must be reasonably expectable.
27. The Agency’s notice of decision ought to indicate why it considers a risk of harm, serious harassment or serious intimidation would be reasonably expectable if the information were disclosed and the severity of that harm.
28. Guidance about the requirements of consideration 3(f) can be found in *AEZ v Commissioner of Police (NSW)* [2013] NSWADT 90. In that case the Tribunal examined the definitions of key terms in the consideration and the issue of objective measure of the reasonably expected consequences. Further guidance can be found in *Australian Vaccination Network v Department of Finance & Services* [2013] NSWADT 60.
29. The three items of information that the Agency decided consideration 3(f) applies to are three floor plans. The notice of decision states that consideration 3(f) is ‘...relevant to an extent with regard to floor plans of private properties, which if publicly released without restriction can leave a property occupier exposed to a risk of harm’.
30. The notice of decision identifies the occupier of the property that is the subject of the Applicant’s request for information as the person who could be subject to a risk of harm if the relevant information was disclosed.
31. The notice of decision does not explain what harm the person is at risk of if the relevant information was disclosed or why that risk of harm is reasonably expectable if the relevant information was disclosed.

32. For these reasons the notice of decision does not establish that the use of the consideration 3(f) is justified when conducting the public interest test.
33. In the discussion about consideration 3(f) the notice of decision refers to schedule 1 to the *Government Information (Public Access) Regulation 2009* (the Regulation) and states that the requirement to make development applications public does not extend to residential plans or specifications submitted with a development application.
34. It is noted that the exemption applies only in the context of on open access information. It does not, by itself, establish that the consideration at clause 3(f) of the table applies to all internal floor plans.
35. The Applicant made an application under section 9 of the GIPA Act (Access applications). The test that must be used when deciding the question of providing access is the public interest test. Only the public interest considerations found in schedule 1 and section 14 of the GIPA Act can be used when conducting the public interest test.

The public interest test

36. 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.
37. Agencies should:
 - a. 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;
 - b. 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
 - c. make a decision about which way the balance lies, in light of the weight in favour and against.
38. 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.
39. It is noted that the Agency conducted consultation with third parties and took the objections to release of the information into consideration when deciding the Application. Therefore the Agency satisfied its obligations under section 54 of the GIPA Act.
40. The notice of decision does not establish that the use of consideration 3(f) is justified as a consideration against disclosure. Without a consideration against disclosure to weigh against the considerations in favour of disclosure, the decision that there is an overriding public interest against the disclosure of the information contained in items 34, 52 and 53 (as listed in the schedule of documents to the notice of decision) is not justified.

41. It is also noted that the notice of decision does not attribute weight to any of the considerations raised in the notice of decision, either for or against disclosure. Therefore it is not clear how the Agency could balance the competing considerations even if the use of consideration 3(f) was justified.

Form of access to information

42. The Applicant requested information in electronic form. This is a request for the Agency to provide a copy of records which is allowed under section 72(1)(b) of the GIPA Act.
43. In additional information provided during the course of this review, the Applicant stated that the Agency made contradictory statements as to who would be required to seek the copyright holder's permission to make copies of certain information (either the Agency or the Applicant).
44. The notice of decision states that the Agency decided to provide access to most of the information requested by way of copies of documents. Access to two items of information (35 and 51 as listed on the schedule of documents) would be provided by way of inspection.
45. It appears that the Agency may have decided to restrict access to inspection only because of concerns about copyright.
46. However, the notice of decision does not raise the subject of copyright or explain why the Agency decided to provide access to items 35 and 51 by inspection only.
47. Items 35 and 51 are described as 'plans' and 'specification/schedule of works' respectively in the schedule of documents. They may be subject to copyright but this is not made clear in the notice of decision.
48. Section 72(1) of the GIPA Act provides four ways that an agency can provide access to government information. They are:
 - a. by inspection;
 - b. providing a copy of a record;
 - c. providing access to a record together with facilities necessary for the information to be accessed; and
 - d. providing a written transcript of information recorded in audio form or shorthand or other encoded formats.
49. Section 72(2) states that an agency must provide an applicant with access to information in the form requested unless one of four conditions is present.
50. An agency is allowed to provide access to information in a form other than that requested by an applicant if providing it in the form requested by an applicant would involve an infringement of copyright (section 72(2)(c) of the GIPA Act).
51. Without satisfying the requirements of section 72(2)(c) (or any other exemption to providing information in the form requested by the applicant allowed in section 72(2) of the GIPA Act), the Agency's decision to provide access to items 35 and 51 in a form other than that requested by the Applicant is not justified.
52. The Information Commissioner published a knowledge update in July 2014 titled 'Copyright and the GIPA Act: Frequently Asked Questions for councils' that provides guidance on issues such as who is responsible for requesting

permission to make copies of copy written material and providing facilities to copy such material. The knowledge update is available on the IPC website.

Searches for information

53. Section 53 of the GIPA Act sets out the requirement to conduct searches.
54. Before deciding that it does not hold information, an agency must comply with the requirements of section 53(2) of the Act. The requirements are:
 - a. undertake such reasonable searches as necessary to locate the information requested; and
 - b. use the most efficient means reasonably available to the agency.
55. 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.
56. When considering whether there are reasonable grounds to believe that information exists and whether 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]).
57. The GIPA Act does not require an 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.
58. The notice of decision provides a brief summary of the searches undertaken in response to the application. They include a search of the Agency’s document management system and discussions with Agency staff. These resulted in two folders being located that contain relevant information.
59. The Applicant believes that information that falls within the scope of his application is held by the Agency but was not identified by the Agency’s searches. The Applicant identified information such as correspondence between the Agency and the architect involved in the relevant project and file notes of the Agency as the types of information he believes should exist.
60. The Applicant provided a number of reasons for his belief. They include:

- a. there have been a significant number of interactions between himself and the Agency (such as correspondence and meetings) yet there is only one file note listed in the schedule of documents:
 - b. given the number of corrections made to the development application in questions, there is likely to be significantly more correspondence between the Agency and the architect involved in the relevant project; and
 - c. there were problems with the complying development certificate (CDC) (including it being issued under an incorrect State Environmental Planning Policy and the timing of various amendments to the CDC) which are likely to have generated correspondence.
61. The Applicant has demonstrated that there are reasonable grounds to believe that information that falls within the scope of his request exists and would be held by the Agency but was not identified by the Agency's searches in response to his application.
62. However, the Agency appears to have made reasonable efforts with its searches in response to the Applicant's request. This is based on the actions taken by the Agency when conducting its searches and the specificity with which the Applicant described the information he sought access to. The Applicant specifically mentioned two files in his application and information in those files was identified by the Agency.
63. It is noted that the Applicant, in additional information provided during the course of this external review, expressed a belief that information such as file notes should also exist. While this may be the case, the Applicant specifically requested correspondence and plans. A file note does not appear to be a type of record that falls within the scope of the application.
64. Therefore it appears that the searches undertaken by the Agency were reasonable in the circumstances and no recommendation is made in relation to this matter.

Recommendations

65. The Information Commissioner recommends, under section 93 of the GIPA Act, that the Agency reconsider its decision in relation to items 34, 52 and 53, by way of internal review.
66. The Information Commissioner recommends, under section 93 of the GIPA Act, that the Agency reconsider its decision to provide access to information by inspection only.
67. In making a new decision, have regard to the matters raised and guidance given in this report.
68. We ask that the Agency advise the Applicant and us by **7 July 2015** of the actions to be taken in response to our recommendations.

Review rights

69. 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.
70. The Applicant has the right to ask the NCAT to review the Agency's decision.

71. 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>

72. 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

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

Elizabeth Tydd
Information Commissioner