

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

Applicant: Applicant
Agency: Wyong Shire Council
Report date: 9 July 2015
IPC reference: IPC15/R000200
Keywords: Government information – reveal personal information –
contravene an information protection principle – consultation

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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 of the information requested, pending expiry of the third party objector's review rights and decided to refuse to provide access to some other information because of an overriding public interest against its disclosure.
3. The Information Commissioner recommends that:
 - a. under section 93 of the GIPA Act, the Agency reconsider the decision and make a new decision, with respect to items 1, 2, 6, 7, 9, 12 and 13; and
 - b. under section 92 of the GIPA Act, in making a new decision, the Agency have regard to the matters raised and guidance given in this report.

Background

4. The Applicant applied under the GIPA Act to the Agency for access to the following information:
 - a. Wyong Mayor Doug Eaton's councillor expenses (phone, computer, tablet and fax expenses) for 2010-2011 and 2011-2012; and
 - b. All Council emails, memoranda, reports memoranda, reports, statutory declarations relating to Mr Eaton's use of Council tablet or laptop while in China during Dec 2010 or January 2011 including Telstra bill received by the Council during that period.
5. On 9 March 2015, the Agency consulted with Mr Eaton as required under section 54 of the GIPA Act, to which Mr Eaton provided his objections on 12 March 2015.
6. In its decision issued on 24 April 2015, the Agency decided:
 - a. under section 58(1)(a) of the GIPA Act to provide access to some of the information requested, pending expiry of the third party objector's review rights; and
 - b. under section 58(1)(d) of the GIPA Act to refuse to provide access to some of the information requested, because there is an overriding public interest against disclosure of the information.
7. In requesting a review of the decision by the Information Commissioner, the Applicant disagrees with the Agency's view that Mr Eaton's privacy overrides the public interest and expresses concern that her "motive for making this application" appears to have been taken into account in the Agency's exercise of the public interest test.
8. Pursuant to section 55(1) of the GIPA Act, the Agency is entitled to take into account the personal factors of the application in determining whether there is an overriding public interest against disclosure of the information, which include at section 55(1)(b) the applicant's motives for making the access application.

9. Section 55(3) of the GIPA Act provides that personal factors of the application can be taken into account as factors against providing access if (and only to the extent that) those factors are relevant to the agency's consideration of whether the disclosure of the information concerned could reasonably be expected to have any of the effects referred to in clauses 2-5 (but not clause 1, 6, or 7) of the Table to section 14.

Decision under review

10. The decision under review is the Agency's decision under section 58(1)(d) of the GIPA Act to refuse to provide access to some of the information requested, because there is an overriding public interest against its disclosure.
11. We have reviewed the notice of decision, and all of the information to which access is refused.
12. The Schedule of Documents in the notice of decision describes the information to which access is refused as follows:

Number	Document reference no.	Title	Access
1	D02687011	Email dated 8 July 2011	Granted in part, except Council's IT password and after appeal rights have expired
2	D02687011	Telecommunications report 22/1/2011 attached to email dated 8 July 2011	Granted in part except dates, location and costs clause 3(b) of Table 14 of the GIPA Act
6	D02699376	Email 25 July 2011	Denied, clause 3(a) of Table 14 of the GIPA Act
7	D02728905	Statutory declaration	Denied, clause 3(a) of Table 14 of the GIPA Act
8	3982	Receipt for notebook	Granted, except for credit card number, clause 3(a) of Table 14 of the GIPA Act, and after appeal rights have expired
9	2714	Statutory declaration	Denied, clause 3(a) of Table 14 of the GIPA Act
10		Receipt for Ipad	Granted, except for credit card number, clause 3(a) of Table 14

Number	Document reference no.	Title	Access
			of the GIPA Act, and after appeal rights have expired
11	3696	Chinese SIM for ipad	Granted, except for credit card number, clause 3(a) of Table 14 of the GIPA Act, and after appeal rights have expired
12		Telephone accounts for 2010-2011 and 2011-2012	Granted, except for dates, telephone numbers, time usage, location and account numbers, clause 3(a) of Table 14 of the GIPA Act, and after appeal rights have expired
13		Ipad usage for 2010-2011 and 2011-2012	Granted, except for account number, address, dates, time usage and location and after appeal rights have expired

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 takes into account the presumption in favour of disclosing information under section 5 of the GIPA Act, before discussing two public interest considerations in favour of disclosure of the information in issue:
 - a. disclosure of the information could reasonably be expected to ensure the effective oversight of the expenditure of public funds; and
 - b. releasing this information would inform the public about this expenditure, which contributes to ensuring transparency and accountability.
20. The notice of decision explains that:
 - a. certain facilities and expenses incurred by Councillors in the exercise of their functions as members of the governing body of the Agency and as elected representatives are paid out of public funds, in accordance with the Agency's Councillor facilities and expenses policy (policy);
 - b. the facilities and expenses in the policy include mobile phones, iPads, other technology and related expenses; and
 - c. the information sought relates to this policy and includes bills, internal email correspondence, receipts and other information in relation to the facilities and expenses incurred by Councillor Eaton.
21. We are satisfied these are relevant considerations in favour of disclosure.
22. Pursuant to section 12(2) of the GIPA Act, we are of the view that the notice of decision would have benefitted from adding a further consideration in favour of disclosure, which is that release of the information could reasonably be expected to inform the public about the Agency's Councillor expenses policy, and contribute to positive and informed debate on the policy and Councillors' use of public funds.
23. We recommend this consideration in favour of disclosure is included in any reconsideration of the decision by the Agency.

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 raised two public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
 - a. reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act); and
 - b. 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).
 28. The Agency has also raised the personal factors of the application to the extent that those factors are relevant to the consideration of whether disclosure of the information could reasonably be expected to reveal personal information and contravene an information protection principle.
 29. Considerations 3(a) and 3(b) are discussed in detail below.
 30. Neither of items 1 or 13 in the Schedule of Documents have attached a consideration against disclosure from the table at section 14 of the GIPA Act. For this reason we recommend that the Agency reconsider the decision with respect to items 1 and 13.
 31. While we make no recommendation against the Agency's decision to refuse access to the IT password in the email item 1, or to certain personal information in item 13, the notice of decision needs to state why the information has not been released, in terms of the public interest considerations against disclosure in the table at section 14 of the GIPA Act.

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

32. 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.
33. 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]
34. 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.
35. The Information Commissioner has published Guideline 4 – Personal information as a public interest consideration under the GIPA Act. 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:
 - a. a person's name;

- b. personal address and contact details, such as email and phone numbers;
 - c. information about a person's family life; and
 - d. financial information, including bank accounts and investments.
36. Guideline 4 also considers the effect of section 5 of the *Privacy and Personal Information Protection Act 1998* (NSW) (PIIP Act) and confirms that if the public interest considerations in favour of disclosure outweigh those against disclosure then personal information can be released to the Applicant.
37. This has the effect that, if it is in the public interest to do so, disclosure of personal information may occur even where a third party has objected to release.
38. In order to establish that consideration 3(a) applies, the Agency 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.
39. Items numbered 6-12 in the Schedule of Documents are refused either in full or in part on the basis of clause 3(a). The notice of decision describes part of the information requested as including:
- ...details of calls made by Councillor Eaton during an extended period of time during which he was on personal leave. The details include the number of calls, the length of those calls, from where (location) and to whom (telephone numbers). The information also includes credit card details, addresses, signatures and statutory declarations.*
40. The notice of decision states that:
- a. the information requested is the personal information of a third party within the meaning of both clause 4 of Schedule 4 of the GIPA Act and section 4 of the PIIP Act; and
 - b. as the information requested is not publicly available and has not previously been revealed, providing access to the Applicant would reveal this information.
41. With respect to items 8, 10, and 11, we are satisfied that the credit card details are personal information which would be revealed by disclosing the information under the GIPA Act.
42. However, we are not satisfied that the Agency has established evidence of personal information for the purposes of the GIPA Act with respect to items 6, 7, 9 and 12.
43. For item 12, (the telephone accounts for 2010-2011 and 2011-2012), the notice of decision claims that dates, phone numbers, account numbers, time usage and location are personal information. We are satisfied that the phone numbers, account numbers and location details are personal information, as they constitute information about an individual whose identity is apparent or reasonably ascertainable. However, we do not agree that details about date and time usage are personal information which would be revealed by disclosing the information under the GIPA Act. We therefore recommend that the Agency make a new decision in relation to item 12.
44. On examination of items 6, 7 and 9, we are not satisfied with the Agency's decision to deny access to the items in their entirety on the basis of clause 3(a).

This is because we are not satisfied that the entire contents of these items meet the definition of personal information in clause 3(a).

45. We recommend that the Agency make a new decision with respect to items 6, 7, and 9 and in doing so, give consideration to section 74 of the GIPA Act, which enables an agency to delete information from a copy of a record because the agency has decided to refuse to provide access to that information.

Consideration 3(b) – contravene an information protection principle information

46. 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 of information if disclosure of the information could reasonably be expected to contravene an information protection principle under the Privacy and Personal Information Protection Act 1998.

47. The information protection principles in the PPIP Act only apply to personal information as defined in that Act, at section 4(1):

...personal information means 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 whose identity is apparent or can reasonably be ascertained from the information or opinion.

48. The notice of decision states that item 2, an Agency Telecommunications report 22/1/2011 attached to the email item 1, is refused on the basis of clause 3(b), with respect to dates, location and costs.
49. To rely on this consideration against disclosure, the Agency must demonstrate a reasonable expectation that an information protection principle or health privacy principle would be contravened by disclosure of the information.
50. The notice of decision refers to the disclosure principle at section 18 of the PPIP Act and states that this prevents the Agency from disclosing personal information to anyone other than the individual to whom this information relates, except in certain circumstances. The Agency does not consider any of those circumstances are applicable to the information sought and that therefore release could reasonably be expected to contravene section 18 of the PPIP Act.
51. Having examined item 2, we are not satisfied that the Agency has demonstrated that the date and cost information it contains meets the definition of personal information in the PPIP Act.
52. The Information Commissioner is therefore not satisfied that the Agency has established that the consideration against disclosure 3(b) applies to the information in item 2 and recommends the Agency make a new decision with respect to item 2.
53. We refer the Agency to Guideline 4, paragraphs 3.10-3.14 for practical guidance on the application of this consideration against disclosure and also to paragraph 3.16, which provides:

If an agency establishes that disclosure of the information could reasonably be expected to contravene an IPP, the question of whether that consideration against disclosure will be an overriding one will depend on the weight given to that consideration. The weight will depend on the type of personal information being requested, the context of the request, and the extent of the breach.

Consultation on public interest considerations

54. In accordance with section 54 of the GIPA Act, the Agency consulted with the relevant third party, who may reasonably be concerned about the disclosure of his personal information.
55. Section 54(5) of the GIPA Act requires an Agency to take into account any objection to disclosure of information received in the course of consultation when determining whether there is an overriding public interest against disclosure.
56. While an objection must be taken into account in the exercise of the public interest test, it is not the only factor to consider in a determination about the release of information and an appropriate weight should also be applied to the consideration.

Balancing the public interest

57. The notice of decision concludes that with the exception of those parts of the information that show or relate to the total amounts expended in public funds, the public interest considerations in favour of disclosure do not outweigh the considerations against disclosure.
58. The notice of decision also submits that:
 - a. the balance of the information is personal information, which has not been revealed publicly and in respect of which an objection has been made; and
 - b. the objection adds weight to the considerations against disclosure, as does the Applicant's identity and motive for making this application, as an employee of a newspaper widely distributed in the Hunter/Central Coast region and online.
59. We remind the Agency that the subject of the GIPA application is not only that information which shows total amounts expended in public funds. The application also encompasses information relating to an elected official's use of Council resources while in China, including relevant Council emails, memoranda and statutory declarations.
60. We are not satisfied with the Agency's exercise of the public interest test. This is because the Agency has not established that the presumption in favour of disclosure which is inherent in the GIPA Act, has been outweighed by the considerations against disclosure at clauses 3(a) and 3(b) of the table at section 14 of the GIPA Act.

Recommendations

61. The Information Commissioner recommends that:

- a. under section 93 of the GIPA Act, the Agency reconsider the decision and make a new decision, with respect to items 1, 2, 6, 7, 9, 12 and 13 by way of internal review; and
 - b. under section 92 of the GIPA Act, in making a new decision, the Agency have regard to the matters raised and guidance given in this report.
62. We ask that the Agency advise the Applicant and us **within 10 working days** of the actions to be taken in response to our recommendations.

Review rights

63. 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.
64. The Applicant has the right to ask the NCAT to review the Agency's decision.
65. 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>

66. 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

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

Elizabeth Tydd
Information Commissioner