



information
and privacy
commission
new south wales

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

Applicant: Applicant
Agency: Richmond Valley Council
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Contents

Summary	2
Background.....	2
Searches for information held by the Agency.....	3
Question one: do the documents exist and are they the Agency's documents?	3
Question two: were the searches reasonable?	6
Our view and recommendations.....	7
Review rights	7
Completion of this review	8

Summary

1. The Applicant applied for information from the Richmond Valley Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency's notice of decision stated that it provided access to the information requested.
3. The Applicant sought a review by the Information Commissioner on the basis that the information provided does not encompass all the information requested in the application.
4. The Information Commissioner recommends that the Agency make a new decision under section 93 of the GIPA Act by way of internal review. This recommendation includes conducting new searches for information within the scope of the access application. This recommendation only extends to information requested with respect to meetings with Councillors.

Background

5. The Applicant applied under the GIPA Act to the Agency for access to the following information:

Information on the date, place, attendees and purpose of all meetings (including but not limited to planning pre-lodgement meetings) between any officer/s of Richmond Valley Council, any Richmond Valley Council Councillor/s, any Richmond Valley Council appointed representative/s (including but not limited to legal representative/s), and [a third party] and/or his representative/s (including but not limited to legal and planning consultant/s) at any location between 1 July 2013 and 31 March 2015 inclusive, including the lunch meeting between the General Manager and [the third party] on 20 February 2014 (reference: Councillors and staff personal benefit disclosure dated 24 February 2014) in date sequence in the following format please to facilitate compilation and readability (Excel is suggested as a practical method):

<i>Date</i>	<i>Place</i>	<i>Attendees (names)</i>	<i>Purpose</i>

The reason for the request is the public interest.

6. On 5 May 2015, the Agency sent its decision to the Applicant. It advised that it had decided to provide the information requested.
7. On 12 May 2015, the Applicant wrote to the Agency with some questions about the Agency's notice of decision. The Agency responded on 15 May 2015. Relevant extracts of this correspondence are set out later in this report.
8. On 27 May 2015, the Applicant wrote to the Information and Privacy Commission seeking a review of the Agency's decision. The Applicant advised that his outstanding concern with respect to the Agency's decision is that the decision was silent in relation to searches for information held by Councillors.

He referred to previous correspondence that states that he seeks the information held by Councillors, or “an unequivocal statement to the effect that no Councillor/s met with [the third party] and/or his representative/s...”

9. The issue in this review is whether the Agency’s searches, for the requested information about Councillor/s meetings, if any, with *[the third party]* or his representative between 1 July 2013 and 31 March 2015, were sufficient.

Searches for information held by the Agency

10. The Agency’s requirement to conduct searches is set out in section 53 of the GIPA Act. Section 53(1) limits the Agency’s search obligations to information held by it when the application was received:

(1) The obligation of an agency to provide access to government information in response to an access application is limited to information held by the agency when the application is received.

11. When the Information Commissioner reviews whether an agency’s search for information was sufficient, we consider two questions, derived from *Smith v Commissioner of Police [2012] NSW ADT 85* at paragraph 27:

(a) Whether there are reasonable grounds to believe that the requested documents exist and are 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.

Question one: do the documents exist and are they the Agency’s documents?

12. The first question goes to whether there are reasonable grounds to believe that the requested documents exist and are documents of the Agency.

13. In an email to the Agency dated 12 May 2015, the Applicant stated the following regarding the notice of decision:

1. Councillors?

The information provided (table) and “Searches for information” pp 1-2 are silent on councillors although forming part of my request.

Please supply the absent information in the established format or otherwise provide an unequivocal statement to the effect that no councillor/s met with [the third party] and/or his representative/s (including but not limited to legal and planning consultant/s) at any location between 1 July 2013 and 31 March 2015 inclusive.

In operational terms, it is expected to involve asking each councillor.

14. In an email to the Applicant dated 15 May 2015, the Agency stated:

As per the information provided in the Notice of Decision dated 5 May 2015 I made enquiries of all relevant staff, including the General Manager to collate the information that you requested. The information provided is an accurate Council record of all meetings held with said [the third party]. It is not Council’s responsibility to keep records of meetings of Councillors. Council’s website contains the contact details

for the elected body should you wish to make enquiries on your own behalf.

15. In his request for review by the Information Commissioner, the Applicant referred to the email correspondence above and stated:

To me as a ratepayer, RVC is a whole body, the sum of its parts. So when I made my formal access application it was made to this whole body, which, by default, includes both staff and councillors. That RVC have since distinguished one from the other is questionable. RVC have the capacity to more easily obtain the information requested, compared to myself. To now ask me to do what I believe they should have done in the first place is both unfair and unreasonable. It also raises the suspicion that RVC are trying to cover something up, as part of their plan to obfuscate due process given the controversial history of the [redacted] subdivision? Besides, there is the distinct possibility that councillors may ignore any request for the information direct from a ratepayer such as myself. On the other hand, at least RVC have obligations under the GIPA Act.

Furthermore, RVC should have been more up front when they issued the Notice of Decision. That was the time to disclose the incomplete nature of the information.

I believe RVC has an obligation to supply the information requested on councillors and would be grateful if you could please arrange supply of it in the interests of responsible, transparent and fair (local) government.

16. On 5 June 2015, in response to a request by this office for additional information, the Agency advised:

... Council had conducted all reasonable searches of its records and no record is held of a meeting [at] which a councillor was present. I personally asked the General Manager if he was aware of any meetings which he confirmed a second time that he was not. As Council was not in possession of any further records or information in relation to his request I suggested to [the Applicant] that he contact each councillor directly to ensure that they did not meet with said [the third party] and/or his representatives in their role of Councillor outside any meeting arranged by Council.

Council does not manage the diaries of Councillors. Councillors are elected by their representatives and serve the community. Their contact details, including email addresses and mobile phone numbers are available as open access information for the community to access.

17. On 17 June 2015, this office referred the Agency to clause 12(1)(d) of schedule 4 to the GIPA Act and asked the Agency to clarify the grounds on which it maintains that the diaries and other records of councillors do not constitute information held by the Agency. Clause 12 of schedule 4 to the GIPA Act defines government information held by an agency as follows:

12 Government information held by agency

(1) A reference in this Act to government information held by an agency is a reference to:

(a) information contained in a record held by the agency, or

(b) information contained in a record held by a private sector entity to which the agency has an immediate right of access, or

(c) information contained in a record in the possession or custody of the State Records Authority (or that the Authority has in the custody or possession of some other person) to which the agency has an immediate right of access, other than a record that is withheld from public access under section 59 of the State Records Act 1998, or

(d) information contained in a record that is in the possession, or under the control, of a person in his or her capacity as an officer or member of staff of the agency (including, in the case of a Minister, the personal staff of the Minister).

(2) Information that would be regarded as government information held by an agency because the agency has access to a record that contains the information is not to be regarded as government information held by the agency if the public generally has access to the record (for example, because the record is available on the Internet).

(3) Information contained in a record that genuinely forms part of the library material held by an agency is not government information held by the agency.

18. On 26 June 2015, the Agency wrote to this office and advised:

Under the Local Government Act 1993 (LGA) the elected Council's role is to direct and control the affairs of the council in accordance with the Act.

Under s223 of the LGA the role of a councillor is, as an elected body:

- to represent the interests of the residents and ratepayers,*
- to provide leadership and guidance to the community, and*
- to facilitate communication between the community and the council.*

In accordance with s223-2335 of the Local Government Act, the elected Council appoints a General Manager who is generally responsible for the efficient and effective operation of the Council's organisation

Effectively, this requires the General Manager to manage the day-to-day activities of the Council and to assist the elected body in their role in providing civic leadership and directing and controlling the affairs of the Council.

Accordingly Councillors do not have a role in the day-to-day management of Council's affairs and whilst the General Manager may assist Councillors in carrying out their civic duties, diary records and

calendars are not managed by Council. Staff have no direct working relationship with Councillors due to the separation of duties between the elected body and the General Manager.

The General Manager facilitates all communication with the elected body and therefore the scope of my search for Councillors' diary notes and calendar appointments was limited to the General Manager's records.

19. In the course of this review we considered the correspondence summarised above, as well as publicly available information on Council's website. Relevant information from Council's website includes its policies titled *Code of Conduct – Councillors/Personnel* and *Payment of Expenses and Provision of Facilities to Councillors Policy*.
20. The *Council's Code of Conduct – Councillors/Personnel* document refers to Councillors as "council officials" (see for example page 4). At part 6.1 of the Code of Conduct, Councillors are referred to as the "governing body" of the council, with the "responsibility of directing and controlling the affairs of the council."
21. The *Payment of Expenses and Provision of Facilities to Councillors Policy* sets out facilities that are made available to Councillors by the Agency. These include access to telephone, email and photocopy facilities (page 6 of the policy), appropriate electronic equipment for communication purposes, reimbursement for 50% of mobile and landline phone services, and a filing cabinet (page 8).
22. Although the Council argues that it does not hold Councillor's records, we are not satisfied that this is justified. This is because the Code of Conduct refers to Councillors as council officials, and because Council facilities are made available to Councillors.
23. We are not satisfied that the Agency has justified its view that records relating to Councillors' official functions, including those in devices provided by Council, do not fall within the definition in clause 12(1)(d) of schedule 4 to the GIPA Act: "information contained in a record that is in the possession, or under the control, of a person in his or her capacity as an officer... of the agency."
24. We consider that there are reasonable grounds to believe that the documents exist and are documents of the Agency.

Question two: were the searches reasonable?

25. As we are satisfied that the first question is answered in the positive, we must now consider whether the searches were reasonable in all the circumstances of this case.
26. The Agency's notice of decision describes its searches as follows:

Your request was forwarded to Richmond Valley Council's Manager Assessment, Environment & Regulation, Paul Radnidge, who has control over all planning matters. It was implied from your request for information regarding meetings with said [third party] that your enquiry related to a planning matter [for] which [third party] is a stakeholder. After consultation with relevant staff, including Planning staff, Managers, Council's Records Coordinator and the General Manager all electronic calendar records and manual diary entries in relation to your request were searched in using the search words "[third party]"

and “[redacted]”. Following the search all meetings with [third party] were identified, extracted and reproduced in table format suggested by you in your request.

27. In his request for review by the Information Commissioner, the Applicant stated “The referenced [third party] is a [redacted] property developer who has submitted a Development Application to RVC to [redacted].”
28. The search terms utilised by the Agency are appropriate in this regard as they include both [the third party’s] name and the name of the relevant site, which is “[redacted].” However, the Agency’s searches did not extend to contacting the Councillors for records containing the requested information. In our view, contacting the Councillors would be reasonable in the circumstances of this case.
29. Agencies should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request, which will depend upon the circumstances of the request and the usual business practices of the agency. For further guidance regarding searches, we refer the Applicant and the Agency to our knowledge update on *Reasonable searches under the GIPA Act*, available at ipc.nsw.gov.au.

Our view and recommendations

30. The Information Commissioner is not satisfied that the Agency has justified its decision because the Agency has not demonstrated that records held by Councillors are, for the purposes of the GIPA Act, excluded from government information held by the Council.
31. The Information Commissioner recommends that the Agency reconsiders its decision under section 93 of the GIPA Act. This recommendation includes conducting new searches for information within the scope of the access application. This recommendation only extends to information requested with respect to meetings with Councillors.
32. We ask that the Agency advise the Applicant and the Information Commissioner by **21 September 2015** of the actions to be taken in response to this recommendation.

Review rights

33. 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.
34. The Applicant has the right to ask the NCAT to review the Agency’s decision.
35. 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>

36. 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

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

Elizabeth Tydd
Information Commissioner