

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

Applicant: Ms Caroline Wilson
Agency: Inverell Shire Council
Report date: 07 April 2016
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Keywords: Government information – decision to refuse access – decision that information is not held – diminish competitive commercial value - prejudice business interests – consultation – the public interest test

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Summary

1. Ms Caroline Wilson (the Applicant) applied for information from the Inverell Shire Council (Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to provide access to some information, to refuse access to some other information and that some information is not held.
3. The Information Commissioner is satisfied that the decision that some information is not held is justified.
4. The Information Commissioner is not satisfied that the decision of the Agency to refuse access to some information is justified and recommends that the Agency:
 - a. reconsider the decision with respect to items 1 and 3 and make a new decision as if the decision reviewed had not been made, pursuant to section 93 of the GIPA Act; and
 - b. in making a new decision, have regard to the matters raised and guidance given in this report.

Background

5. On 9 October 2015 the Applicant applied under the GIPA Act to the Agency for access to the following information:
 - 1) an itemised account of how much was the cost of the first arborist's report (undertaken by Person A);
 - 2) an itemised account of the cost of the peer report undertaken by Person B;
 - 3) an itemised account of the cost of the additional report undertaken by Person C and Person A;
 - 4) details regarding who was hired to source the trees (that includes the Chanticleer Pear, Pin Oaks, Maple Trees and any others that form part of the renewal of the CBD and other streets of Inverell; and
 - 5) the overall costing of such sourcing.
6. In its initial decision issued on 02 November 2015, the Agency decided to provide access to item 2, to refuse access to items 1 and 3 because of an overriding public interest against disclosure and that items 4 and 5 are not held.
7. The Applicant requested an internal review of the decision and on 30 November 2015, the Agency upheld its initial decision. With respect to items 4 and 5, the Agency added that no individual or company was contracted to source the trees, therefore no information is held in relation to the overall cost of sourcing.
8. On 16 December 2016, the Information Commissioner received the Applicant's request for external review of the Agency's decision.

Decisions under review

9. The two decisions under review are the Agency's decisions:

- a. to refuse access to items 1 and 3; (reviewable under section 80(d) of the GIPA Act); and
- b. that items 4 and 5 are not held (reviewable under section 80(e) of the GIPA Act).

Agency's decision that information is not held

10. With respect to items 4 and 5, the Agency decided that information is not held. Before deciding that information is not held, an agency must comply with the requirements of section 53(2) of the GIPA Act. It must undertake reasonable searches as may be necessary to find any of the government information applied for that was held by the agency when the application was received. The agency's searches must be conducted using the most efficient means reasonably available.
11. 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.*
12. 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 are 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]).
13. On page 2 of the notice of decision, the Agency describes the searches undertaken of its records management system, financial management system and hardcopy vouchers, including a list of search terms employed. The records located are listed as follows:
 - 1) Tax invoice dated 23.4.2012 from Person A;
 - 2) Tax invoice dated 28.7.2015 from Person B;
 - 3) Tax invoice dated 4.8.2015 from Person A; and
 - 4) Email to Concerned Inverell Ratepayers Association Secretary dated 27.3.2015, which details the Agency's "response in writing when queried about who was hired to source the trees."
14. We are satisfied, based on the information before us, that the search efforts of the Agency have been reasonable in the circumstances of the case. With respect to whether there are grounds to believe that the requested items 1-5 in the GIPA application exist, we are satisfied this is the case in relation to items 1-3.

15. With respect to items 4-5 in the GIPA application, the Applicant seeks answers to specific questions in relation to who was hired to source the trees that form part of the renewal of the CBD and other streets of Inverell, and the overall cost of such sourcing. The notice of decision states that no individual or company was hired to source the trees and therefore, no documentation about costing is held by the Agency.
16. We are satisfied based on the information provided, that no information exists which meets the terms of items 4 and 5 of the Applicant's request.

A request for answers to questions

17. With respect to the Applicant's request for answers to questions in items 4 and 5 of the GIPA application, we offer the following guidance.
18. In its decision in *Davison v NSW Department of Education and Training [2013] NSW ADT 25* at [3] the Tribunal considered what constitutes the terms of an access application for the purposes of the GIPA Act.
19. The GIPA Act provides applicants with the right to seek access to government information held by the Agency at the time the request is made.

It is not a vehicle for seeking answers to questions a person might have in regard to administrative action taken by a government agency, or seeking an explanation by an agency as to why particular action was taken.
20. It is not a mechanism through which responses to questions may be sought unless that explanation is contained in a record of the agency at the time the GIPA access request was made.
21. We recommend pursuant to section 95 of the GIPA Act that in dealing with future access requests, the Agency clarify the nature of the request if necessary and advise the Applicant that an access application under the GIPA Act cannot be used as a mechanism to request answers to questions or seek clarification of information to which access has been provided.

The public interest test

22. 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.
23. 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.
24. 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.
25. 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.
26. 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

27. The notice of decision identifies that section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information. This must always be weighed in the application of the public interest test.
28. The Agency may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).
29. In its notice of decision, the Agency identified the following public interest consideration in favour of disclosure of the information in items 1, 2 and 3:

disclosure could reasonably be expected to ensure effective oversight of the expenditure of public funds, because the information relates to payment for services rendered and paid from the Agency's funds.
30. The Agency decided this was a weak consideration in favour of disclosure because expenditure is in accordance with the Agency's Management Plan and Procurement Procedures.
31. We are satisfied this is a relevant consideration in favour of disclosure. However, we are not satisfied with the Agency's reasoning that because expenditure was in accordance with the Agency's procedures it diminishes the significance of the public interest in the effective oversight of public funds expenditure.
32. Our view is that another relevant public interest consideration in favour of disclosure of items 1, 2 and 3 is that they would inform the public about the operations of the Agency with respect to trees forming part of the renewal of the CBD and other streets of Inverell.
33. We recommend that in any reconsideration of its decision, the Agency note that it is not limited in terms of considerations in favour of disclosure which can be taken into account in its exercise of the public interest test.

Public interest considerations against disclosure

34. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
35. 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.
36. 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.
37. In its notice of decision the Agency raised two public interest considerations against disclosure of the information in items 1, 2 and 3, deciding that its release could reasonably be expected to:

- a. diminish the competitive commercial value of any information to any person (clause 4(c) of the table to section 14 of the GIPA Act); and
 - b. prejudice any person's legitimate business, commercial, professional or financial interests (clause 4(d) of the table to section 14 of the GIPA Act).
38. We will discuss each of these considerations in turn.

Consideration 4(c) – diminish the competitive commercial value of any information to any person

39. Clause 4(c) 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 diminish the competitive commercial value of any information to any person.

40. In order for this to be a relevant consideration against disclosure, the Agency must demonstrate that releasing the information could reasonably be expected to have the effect outlined in clause 4(c) and base this on substantial grounds.
41. The definition of the phrase “could reasonably be expected to” means more than a mere possibility, risk or chance and must be based on real and substantial grounds and not be purely speculative, fanciful, imaginary or contrived.
42. In particular the Agency must identify why the information in items 1, 2 and 3 has a competitive commercial value, and how that value would be adversely affected if the information was disclosed.
43. The notice of decision states that disclosure could reasonably be expected to diminish the competitive commercial value of any information to any persons because the information includes commercial and financial information of the person.
44. In circumstances in which the Agency has not articulated why the information has a competitive commercial value, or how this would be adversely affected if disclosure were to occur, we are not satisfied that the Agency has established the relevance of this consideration against disclosure with respect to items 1, 2 and 3.

Consideration 4(d) – prejudice any person's legitimate business, commercial, professional or financial interests

45. Clause 4(d) 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 prejudice any person's legitimate business, commercial, professional or financial interests.

46. In order for clause 4(d) to apply, the Agency must:
 - a. identify the relevant legitimate interest; and
 - b. explain how the interest would be prejudiced if the information was disclosed.
47. Our view is that the relevant meaning of “legitimate” for the purposes of this consideration is its ordinary meaning, that is genuine and not spurious.

48. The notice of decision states that this consideration against disclosure is relevant because the information requested includes commercial and financial information of the person. It maintains this is a strong consideration against release of the information requested.
49. We are not satisfied that the Agency has established the relevance of this consideration against disclosure in circumstances in which it has not identified the person's legitimate interest, or explained the prejudicial consequences to the person's interest if disclosure occurs.

Consultation

50. Pursuant to section 54 of the GIPA Act, the Agency consulted with some relevant third parties with respect to information in items 1, 2 and 3, which comprised the third parties' personal or business information.
51. The notice of decision states that there was no objection to the release of information in item 2, and that objections to the release of items 1 and 3 "*relate to the commercial value of the information and the financial affairs of the person*".
52. While a third party objection is not determinative in itself, it is an important contribution to an Agency's decision and must be taken into account when an Agency determines whether there is an overriding public interest against disclosure of information.
53. We refer the Agency to the Information Commissioner's *Guideline 5: Consultation on public interest considerations under section 54 of the GIPA Act*, for guidance as to how considerations against disclosure are informed by consultation with persons who may reasonably be expected to have concerns about disclosure of information under the GIPA Act.
54. We recommend that in any reconsideration of its decision, the Agency have regard to Guideline 5, as required by section 15 of the GIPA Act.

Balancing the public interest

55. 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.
56. We are not satisfied that the Agency has established the relevance of the two public interest considerations against disclosure from the table at section 14 of the GIPA Act. We also refer to our comments in paragraphs 31-33 in relation to the public interest considerations in favour of disclosure.
57. Therefore we are not satisfied that the presumption in favour of disclosure which is inherent in the GIPA Act, or the identified consideration in favour of disclosure at paragraph 4.1 in the notice of decision have been outweighed in the Agency's exercise of the public interest test.

Recommendations

58. The Information Commissioner is satisfied that the decision that the information requested in items 4 and 5 is not held is justified.

59. The Information Commissioner is not satisfied that the decision of the Agency to refuse access to items 1 and 3 is justified and recommends that the Agency:
 - a. reconsider the decision with respect to items 1 and 3 and make a new decision as if the decision reviewed had not been made, pursuant to section 93 of the GIPA Act; and
 - b. in making a new decision, have regard to the matters raised and guidance given in this report.
60. We ask that the Agency advise the Applicant and us by **10 working days from the date of this report** of the actions to be taken in response to our recommendations.

Review rights

61. 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.
62. The Applicant has the right to ask the NCAT to review the Agency's decision.
63. 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>
64. 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

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

Elizabeth Tydd
Information Commissioner