



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

Applicant: Mr Patrick Aitken
Agency: Central Coast Council
Report date: 16 May 2017
IPC reference: IPC17/R000163
Agency reference: 107.275/23935864
Keywords: Government information – access provided in part – prejudice the effective exercise of agency functions – prejudice court proceedings
Legislation cited: *Government Information (Public Access) Act 2009*;
Cases cited: *McLennan v University of New England* [2013] NSWADT 113 at [38]

This review has been conducted under delegation by the Information Commissioner pursuant to Section 13 of the *Government Information (Information Commissioner) Act 2009*

Summary

Mr Patrick Aitken (the Applicant) applied for information from the Central Coast Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act). The information sought by the Applicant is the Wamberal Beach NSW Storm Erosion Remediation Report prepared by Coastal Environment Pty Ltd.

The Agency decided to provide access by viewing at the Agency to some information with redactions and decided that there is an overriding public interest against disclosure of some information.

The Applicant applied for external review on 3 April 2017. The reviewer obtained information from the Agency including the notice of decision and the Agency's GIPA file.

The review of the Agency's information and decision concluded that its decision is not justified.

The reviewer recommends the Agency make a new decision.

Background

1. The Applicant applied under the GIPA Act to the Agency for access to the following information:
 - a. Report to Central Coast Council titled “Wamberal Beach NSW Storm Erosion Remediation. Report R16-029-01-01 Prepared by Coastal Environment Pty Ltd July 2016 (the Report).
2. In its decision at first instance issued on 16 March 2017, the Agency decided to provide access to some information with redactions and to refuse access to some information because of an overriding public interest against disclosure.
3. In seeking a review of the decision by the Information Commissioner, the Applicant states:

Despite considering in favour of disclosure, Central Coast Council has instead deciding to ignore informing the community, not reveal environmental or health risks or measures relating to public health and safety, not contribute to the protection of the environment and not contribute to the positive and informed debate on issues of public importance. Council must change its decision in order to meet community expectations of good governance.

Decisions under review

4. The Information Commissioner has jurisdiction to review the decision made by the Agency pursuant to section 89 of the GIPA Act.
5. The decisions under review are the Agency's decisions to refuse access to some information because of an overriding public interest against disclosure and its decision to provide access to some information in a particular way (viewing).
6. These are reviewable decisions pursuant to sections 80(d) and 80(i) of the GIPA Act respectively.
7. The issue in this review is the application of the public interest test and the way access to information has been provided.

The public interest test

8. 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. For further information on the public interest test, see the resource sheet at the end of this report.

Public interest considerations in favour of disclosure

9. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
 - a. The presumption in favour of disclosing government information (section 5 of the GIPA Act);

- b. The general public interest in favour of disclosing government information under section 12 of the GIPA Act;
 - c. To inform the community of the Agency's operations regarding public areas;
 - d. Reveal environmental or health risks or measures relating to public health and safety;
 - e. Contribute to the protection of the environment; and
 - f. Contribute to the positive and informed debate on issues of public importance.
10. Each consideration in favour of disclosure was afforded significant weight.

Public interest considerations against disclosure

11. In its notice of decision the Agency raised the following public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
- a. Prejudice the effective exercise by an agency of the agency's functions (clause 1(f) of the table to section 14 of the GIPA Act); and
 - b. Prejudice any court proceedings by revealing matter prepared for the purpose of or in relation to current or future proceedings (clause 3(c) of the table to section 14 of the GIPA Act)
12. I will discuss each of these considerations in turn.

Consideration 1(f) – prejudice the effective exercise by an agency of the agency's functions

13. For guidance on the application of clause 1(f) of the table at section 14 as a public interest consideration against disclosure, see the information resource at the end of this report.
14. In the notice of decision the Agency states:
- The Report identifies certain risks, including by reference to specific properties that have frontage to Wamberal beach, and provided recommendations and priorities to the Council to assess those risks. The Council has a number of functions and involvement of varying levels with respect to coastal areas within its local government area, such as Wamberal beach. The Report clearly relates to those functions. It is my view that the disclosure of the parts of the Report, to which I have decided to refuse to provide you with access to, could reasonably be expected to prejudice the Council's ability to exercise its functions effectively. Disclosure could result in external influences which would detract from a full and proper assessment of the risks and recommendations contained in the Report.*
15. In this statement by the Agency it is not clear what particular functions are being referred to. Mention is made of a number of functions of the Agency however none of these functions are articulated specifically.
16. The Agency states that disclosure could result in external influences detracting from a full and proper assessment of the risks and recommendations contained in the Report.

17. I have reviewed the information and I am not satisfied that the Agency has sufficiently described the functions which could reasonably be expected to be prejudiced by release of the information concerned.
18. Further, the Agency has not described the prejudice that could reasonably be expected to occur, or how external influences might detract from a full and proper assessment of the risks and recommendations contained in the Report.
19. On this basis I am not satisfied that has justified its application of clause 1(f) as a relevant public interest consideration against disclosure.
20. I recommend the Agency make a new decision by way of internal review.

Consideration 3(c) – prejudice any court proceedings, by revealing matter prepared for the purposes of or in relation to current or future proceedings

21. For guidance on the application of clause 3(c) of the table at section 14 as a public interest consideration against disclosure, see the information resource attached to the end of this report.
22. The Tribunal has accepted that the word ‘prejudice’, in the context of the public interest considerations against disclosure, is to be given its ordinary meaning, namely: ‘to cause detriment or disadvantage see: *McLennan v University of New England* [2013] NSWADT 113 at [38].
23. The test set out in the attached information resource sheet (Consideration 3(c)) has three requirements all of which must be satisfied in order to establish that clause 3(c) is a relevant consideration against disclosure. One requirement that must be satisfied is that the information in question was prepared for the purposes of or in relation to current or future proceedings.
24. In the notice of decision the Agency states:

The report was commissioned by Council for the purposes of informing it as to risks resulting from the storm event at Wamberal Beach. It is considered that this factor against release of parts of the Report is applicable as the information was sought to inform Council should future proceedings arise.
25. The introduction of the Report indicates that the report was commissioned to assist the Council manage the risks associated with the storm event that incurred damage at Wamberal Beach in 2016.
26. The Agency does not provide information about proceedings that are either current or may occur in the future, nor does it describe what prejudice might occur to any proceedings that are either current or may occur in the future.
27. The Agency has not provided detail in relation to the anticipated prejudicial effect.
28. On this basis I am not satisfied that the Agency has justified its application of clause 3(c) as a relevant public interest consideration against disclosure.

Balancing the public interest test

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. In the notice of decision under review, the Agency considered the relevant public interest considerations in favour and against disclosure of the information. The Agency identified six public interest consideration in favour of disclosure and two public interest consideration against disclosure.
 31. The Agency afforded significant weight to all the considerations in favour and against disclosure.
 32. For the reasons outlined above, I am not satisfied that the Agency's application of the public interest test met the requirements of the GIPA Act, including the presumption in favour of disclosure at section 5, the public interest consideration in favour of disclosure at section 12(1), and the provision in section 13 that there is an overriding public interest against disclosure, and, on balance, those considerations outweigh the public interest considerations in favour of disclosure. As the Agency has not demonstrated that this test has been met, I cannot be satisfied that the Agency's decision is justified. I recommend the Agency reconsider its decision in relation to the public interest test.

Access provided in a particular way

33. Section 72(2) of the GIPA Act provides that the Agency must provide access to information in the way requested by the Applicant unless:
 - a. to do so would interfere unreasonably with the operations of the agency or would result in the agency incurring unreasonable additional costs, or
 - b. to do so would be detrimental to the proper preservations of a record, or
 - c. to do so would involve an infringement of copyright, or
 - d. there is an overriding public interest against disclosure of the information in the way requested by the applicant.
34. Information provided to the IPC by the Applicant states:

(the Council) have restricted inspection of the redacted document to no more than 4 people at a time, 3 days written notice must be provided to inspect the document, a copyright agreement must be signed, you cannot record or photograph the redacted document and are restricted to only copying up to 10% of the content of the redacted document and a Council Officer is to be present during the inspection.
35. On 2 May 2017 we contacted the Agency and requested information regarding the claim of copyright over the document.
36. On 4 May 2017 the Agency advised the IPC that it had consulted with the author of the Report who advised that subject to the wording on page 2 of the Report he consents to the release of the report.
37. Page two of the report states that no part of the Report is to be reproduced without the express permission of the client. The client is the Agency.
38. The Agency also advised that it consulted with its relevant business area and this area declined to provide consent to reproduce the document.

39. It is under these circumstances that the Agency claims that the document is copyrighted.
40. The Department of Communications and the Arts provide the following at Page 6 of its Short Guide to Copyright¹:

The Copyright Act does not require the completion of formalities (such as publication, registration or the payment of fees) in order to obtain protection in Australia...
41. In its publication *Copyright Information from the ANU library: Copyright for students*² the Australian National University states:

Copyright protection applies automatically when material is created, and is therefore free.
42. On this basis I am satisfied that copyright for the document exists and therefore the Agency's decision under Section 72(2)(c) in regards to the way access has been provided is justified.

The Agency's disclosure log

43. The Applicant raised with us the issue of the Agency not placing the information deemed for release and the GIPA request on its disclosure log as it stated it would do so.
44. I have reviewed the Agency's disclosure log and I am satisfied that information in relation to the access application has not been placed on the disclosure log.
45. Under section 80(m) of the GIPA Act a decision by an Agency to place information on the disclosure log is a reviewable decision.
46. However an Agency's decision not to place the information on the log is not a reviewable decision. However, I note in the Agency's notice of decision that it decided to place the information on the disclosure log, although it appears this has not occurred.

Conclusion

47. On the information available, I am not satisfied that the Agency's decision to withhold access to information is justified. I am however, satisfied that the Agency's decision to provide access by viewing is justified.

Recommendation

48. I recommend under section 93 of the GIPA Act that the Agency make a new decision regarding the withholding of information, by way of internal review. In making a new decision, I also recommend the Agency consider the disclosure log requirements in section 25 of the GIPA Act.
49. I ask that the Agency advise the Applicant and the IPC by 25 May 2017 of the actions to be taken in response to our recommendations.

¹ Short Guide to Copyright Department of Communications and the Arts November 2016

² The Australian National University: Copyright information from the NAU Library: Copyright for Students online publication

Applicant review rights

50. This review is not binding and is 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.
51. The Applicant has the right to ask the NCAT to review the Agency's decision.
52. 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>

53. 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

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

Lee Fisher

Investigation and Review Officer



SECTION 14: Public interest consideration against disclosure

Consideration 1(f) – prejudice the effective exercise by an agency of the agency's functions

Clause 1(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 prejudice the effective exercise by an agency of the agency's functions

To show that this is a relevant consideration against disclosure, the Agency must establish:

- a. the relevant function of the agency that would be prejudiced by release of the information; and
- b. how that prejudice could reasonably be expected to occur.

Once the relevant function of the Agency has been identified, the Agency needs to establish a substantial adverse effect to the exercise of that function.

This requires a demonstration of the detriment or disadvantage that would occur by the disclosure of the information on the agency's function.

The Tribunal has accepted that the word 'prejudice', in the context of the public interest considerations against disclosure, is to be given its ordinary meaning, namely: 'to cause detriment or disadvantage': see *Hurst* (supra) at [60], *McLennan v University of New England* [2013] NSWADT 113 at [38] and *Sobh v Victoria Police* (1993) 1 VR 41.



What is the public interest test?

Fact sheet
January 2016

The right to information system in New South Wales aims to foster responsible and representative government that is open, accountable, fair and effective.

Under the *Government Information (Public Access) Act 2009* (GIPA Act), all government agencies must disclose or release information unless there is an overriding public interest against disclosure. When deciding whether to release information, staff must apply the public interest test. This means, they must weigh the factors in favour of disclosure against the public interest factors against disclosure.

Unless there is an overriding public interest against disclosure, agencies must provide the information. There are some limited exceptions to this general rule, for example where dealing with an application would constitute a significant and unreasonable diversion of an agency's resources.

Applying the public interest test

The public interest test involves three steps:

1. Identify the relevant public interest considerations in favour of disclosure
2. Identify the relevant public interest considerations against disclosure
3. Determine the weight of the public interest considerations in favour of and against disclosure and where the balance between those interests lies.

Step 1: Identify the relevant public interest considerations in favour of disclosure

The GIPA Act (section 12) provides examples of factors that agencies may consider in favour of disclosure. These are:

- promoting open discussion of public affairs, enhancing government accountability or contributing to positive and informed debate on issues of public importance;
- informing the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public;
- ensuring effective oversight of the expenditure of public funds;

- the information is personal information of the person to whom it is to be disclosed; and
- revealing or substantiating that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

This is not an exhaustive list and agencies may identify other factors in favour of disclosure.

The Information Commissioner may also issue guidelines on additional considerations favouring disclosure.

Step 2: Identify the relevant public interest considerations against disclosure

The GIPA Act (section 14) provides an exhaustive list of public interest considerations against disclosure. These are the **only** considerations against disclosure that agencies may consider in applying the public interest test.

Considerations are grouped under the following headings:

- Responsible and effective government
- Law enforcement and security
- Individual rights, judicial processes and natural justice
- Business interests of agencies and other persons
- Environment, culture, economy and general matters
- Secrecy provisions specifically provide in other legislation
- Exempt documents under interstate Freedom of Information legislation.

The GIPA Act says that in applying the public interest test, agencies are **not** to take into account:

- that disclosure might cause embarrassment to, or loss of confidence in, the government or an agency
- that any information disclosed might be misinterpreted or misunderstood by any person.



Consideration 3(c) – prejudice any court proceedings

Clause 3(c) of the table at section 14 of the GIPA Act provides:

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice any court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings

To show this is a relevant consideration against disclosure, the Agency may need to consider such questions as:

- a. which court proceedings would be prejudiced?
- b. how would the court proceedings be prejudiced?
- c. what event was the information prepared in response to?

The Agency needs to provide sufficient detail with respect to the anticipated prejudicial effect, and base this on relevant facts.

It must give reasons, including the findings on any material questions of fact underlying those reasons, together with a reference to the sources of information on which those findings are based (section 61(1) and (b) of the GIPA Act.)