



10-165 – Final report on review under section 89 of the *Government Information (Public Access) Act 2009*

Access applicant: Mr Denys Clarke
Agency: Blacktown City Council
Date of final report: 7 September 2011

A Summary of provisional recommendations

1. The Information Commissioner makes the following recommendations in relation to the agency's decision:
 - a. pursuant to section 94 of the GIPA Act, the Information Commissioner recommends against the agency's decision that there is an overriding public interest against disclosure of the information requested by the applicant;
 - b. pursuant to section 93 of the GIPA Act, the Information Commissioner recommends that the agency make a new decision by way of internal review within fifteen working days of the date of this report; and
 - c. pursuant to section 127 of the GIPA Act, the agency exercise its discretion to waive the internal review fee of \$40.00.

B Background

2. On 9 November 2010, the applicant made a formal access application to the agency, pursuant to section 41 of the *Government Information (Public Access) Act 2009 (GIPA Act)*. The application requested:

"In the public interest, I require a copy of Report No AD 300030 and attachments (if any)."
3. The report requested relates to the annual performance review of the General Manager of the agency, Mr Ron Moore.
4. On 15 November 2010, the agency notified the applicant that the application was valid. Through its searches, the agency identified the document titled 'Council Report AD 300030' as falling within the scope of the application. The report includes three attachments:

promoting open government

Attachment 1 – Detailed Assessment against Adopted Criteria

Attachment 2 – Draft Proposed Part 2 Objectives

Attachment 3 – Renewal 5 year Contract

5. On 7 December 2010, the agency issued a notice of decision to the applicant. The agency released the information in part and that decision is summarised in the following table:

Report AD 300030	Released in part. Personal information of Mr Moore redacted.
Attachment 1	Not released. Proforma of the General Manager's Performance Agreement released instead to show criteria that General Manager is assessed against.
Attachment 2	Released in full.
Attachment 3	Not released.

6. On 10 January 2011, the Office of the Information Commissioner (OIC) received the applicant's request for an external review pursuant to section 89 of the GIPA Act.

C Conduct of this review

7. I have been delegated with the authority to conduct reviews pursuant to section 89 of the GIPA Act and to exercise related powers under the *Government Information (Information Commissioner) Act 2009* (NSW) (**GIIC Act**).
8. The office of the Information Commissioner has conducted the review in the following way:
- a. reviewed the information provided by the applicant;
 - b. requested and reviewed a copy of the agency's file, which included a copy of the information to which access has been refused;
 - c. discussed the information and reasons for review with the applicant and the agency;
 - d. consulted with the NSW Privacy Commissioner in accordance with section 94(2) of the GIPA Act;
 - e. provided the Information Commissioner's provisional view to the applicant and the agency on 28 July 2011; and

- f. received and considered submissions from the applicant and the agency in response to the provisional view.

D Reviewable decisions addressed in this review

- 9. The following reviewable decision has been addressed in this review:
 - a. the decision to refuse to provide access to information in response to an access application (section 80(d) of the GIPA Act). In particular:
 - i. the public interest considerations identified in favour of and against the disclosure of the information; and
 - ii. the application of the public interest test.

E The public interest test

- 10. A person who makes an access application for government information has a legally enforceable right to access the information requested unless there is an overriding public interest against disclosure of the information, pursuant to section 9(1) of the GIPA Act.
- 11. Section 13 of the GIPA Act sets out the public interest test as follows:

There is an **overriding public interest against disclosure** of government information for the purposes of this Act if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure.
- 12. When applying the public interest test, an agency should begin with the general presumption in favour of disclosure of government information provided for at section 5 of the GIPA Act.
- 13. The agency must then:
 - a. identify further public interest considerations in favour of disclosure;
 - b. identify any public interest considerations against disclosure;
 - c. determine the weight of the public interest considerations in favour of and against disclosure; and
 - d. determine where the balance between those interests lies.
- 14. The public interest considerations in favour of disclosure of government information are not limited. However, the public interest considerations against disclosure are limited to those considerations set out in the table at section 14 of the GIPA Act.
- 15. Raising a public interest consideration against disclosure and demonstrating that it applies to a particular access application does not demonstrate why it outweighs any public interest considerations in favour of disclosure. Public interest considerations in favour of disclosure must be weighed and balanced against public interest considerations against disclosure.

16. In applying the public interest test agencies must follow the principles set out in section 15 of the GIPA Act.

G Agency's reasons for decision

17. If an agency decides not to release information to an applicant because of an overriding public interest against disclosure, section 61 of the GIPA Act requires that the agency provide the applicant with its reasons for refusing access to the information.

18. Section 61 of the GIPA Act provides:

Notice of an agency decision to refuse to provide access to information because there is an overriding public interest against disclosure of the information must state the following:

- (a) the agency's reasons for its decision;
 - (b) 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;
 - (c) the general nature and the format of the records held by the agency that contain the information concerned.
19. The above requirements will not be satisfied by a mere statement of the public interest considerations against disclosure. An agency must provide sufficient detail of the reasons for its decision. It should demonstrate:
 - a. how the identified public interest consideration/s against disclosure apply to the information requested; and
 - b. why the agency considers that, on balance, the public interest considerations against disclosure outweigh the public interest considerations in favour of disclosure.

H Public interest considerations in favour of disclosure

20. The GIPA Act promotes and facilitates access to government information, evidenced in the long title and objects of the Act. The statutory presumption in favour of the release of government information at section 5 of the GIPA Act, supported by sections 10 and 12(1) of the Act, tilts the construction of the Act in favour of the disclosure of government information. When all provisions of the GIPA Act are applied, the weight of the public interest considerations in favour of disclosure is significant.
21. In its notice of decision, the agency acknowledged the presumption in favour of disclosure as well as the applicant's right to information (section 9(1) of the GIPA Act). However, the agency did not identify any further considerations in favour of disclosure of the information.
22. Section 12 of the GIPA Act does not limit the public interest considerations in favour of disclosure of information that may be considered relevant to the

public interest test. It does provide some examples of considerations in favour of disclosure, such as:

- a. Disclosure of the information could reasonably be expected to promote open discussion of public affairs, enhance Government accountability or contribute to positive and informed debate on issues of public importance.
 - b. Disclosure of the information could reasonably be expected to ensure effective oversight of public funds.
23. The Information Commissioner is satisfied that the above public interest considerations in favour of disclosure apply to this access application, and that the agency should have considered them in its decision. The information requested is a report that relates to the performance review of the General Manager of the agency. The performance review informed the agency's decision to renew the General Manager's contract for a term of five years. The General Manager is a person engaged in a public function who should be accountable and responsible to the public.
24. These have been recognised in other jurisdictions as relevant considerations in favour of disclosure of the salary and conditions of employment of officials paid from the public purse. In *Lower Burdekin Newspaper Company Pty Ltd and Lower Burdekin Shire Council* [2004] QICmr 2 (24 February 2004) [27] Queensland Information Commissioner Sorenson observed:

In a representative democracy, elected representatives are accountable to the electors for decisions made in respect of raising and spending public funds. The public has a strong, legitimate and abiding interest in having access to sufficient information to enable scrutiny of whether funds raised by government are expended efficiently and effectively in furtherance of the public interest. This extends to scrutiny of whether the public is obtaining value for money from performance of the duties of particular positions for which government had decided to allocate funding. This public interest is even stronger in the case of senior officers who have responsibility for devising and/or implementing strategic and operational plans, and delivering key performance outcomes.

25. In that case, salary, not a performance report, was disclosed. The present applicant seeks the disclosure of different information from that which was the subject of the application in *Lower Burdekin*. While this application relates to information of a different type than salary information, the public interest in the information is the same.

I Public interest considerations against disclosure

26. The only public interest considerations against disclosure that may be used in the application of the public interest test are those listed in the table to section 14 of the GIPA Act. To show that a consideration from the table applies to information, the agency must establish that the disclosure of the information "...could reasonably be expected to have...the...effect" outlined in the table.

27. The words “reasonably expected to have the effect” have their ordinary meaning: “whether it is reasonable, as opposed to irrational, absurd or ridiculous, to expect” that the anticipated effect would occur.¹
28. The agency must therefore demonstrate that:
 - a. the information is of the class described in the consideration against disclosure; and
 - b. it is reasonable to expect that the disclosure of the information could have the effect described by the legislation.
29. The agency applied three considerations from the table at section 14 of the GIPA Act and decided that the release of the information could reasonably be expected to have the following effects:
 - a. reveal an individual's personal information (section 14 table 3(a));
 - b. contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* or a Health Privacy Principle under the *Health Records and Information Privacy Act 2002* (section 14 table 3(b)); and
 - c. expose a person to a risk of harm or of serious harassment or serious intimidation (section 14 table (3(f))).
30. The Information Commissioner has examined each of these considerations and whether it applies to the information requested by the applicant.

Reveal an individual's personal information

31. The consideration at section 14 table 3(a) will apply where information could reasonably be expected to reveal an individual's personal information (being an individual other than the applicant).
32. Schedule 4 clause 4 of the GIPA Act provides:
 - (1) In this Act, **personal information** means information or an opinion...about an individual...whose identity is apparent or can reasonably be ascertained from the information or opinion.
 - (2) ...
 - (3) Personal information does not include any of the following:
 - (a) ...

¹ *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190 per Bowen and Beaumont JJ, who also found the estimation of probabilities of effects occurring to be an erroneous application of the Act. See also *Re Thiess and Department of Aviation* (1986) 9 ALD 454 at 463.

(b) information about an individual (comprising the individual's name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions.

(c) ...

33. Schedule 4 clause 1 provides the following definition:

Reveal information means to disclose information that has not already been publicly disclosed (otherwise than by unlawful disclosure).

34. The agency has categorised the information contained in the report as the personal information of Mr Moore. It stated in its notice of decision that "...there is an overriding public interest against disclosure of the matter that are personal affairs of Mr Moore". The Information Commissioner notes that "personal affairs" is the terminology of the repealed *Freedom of Information Act 1989*. The GIPA Act refers to "personal information", which reflects the language of the *Privacy and Personal Information Protection Act 1998* (PIIP Act). The Information Commissioner encourages the agency to adopt the words of the GIPA Act when making future decisions under the Act.

35. The information contained in the report includes the collective opinion of a committee of the agency regarding Mr Moore's performance as General Manager. Given that it is an opinion about Mr Moore that is not already publicly available, the release of the report could reasonably be expected to reveal personal information about Mr Moore.

36. The exception to the definition of personal information at Schedule 4 clause 4(3)(b) of the GIPA Act means that Mr Moore's name, position title and non-personal contact details are not 'personal information' for the purpose of the consideration at section 14 table (3)(a). However, other information in the report reveals more than the fact that Mr Moore is engaged in public functions and does constitute his personal information.

37. The Information Commissioner is therefore satisfied that the consideration at section 14 table 3(a) is a relevant consideration in the application of the public interest test.

38. Section 54 of the GIPA Act provides that an agency must consult with a person before releasing information relating to that person. The agency has satisfied this requirement and established that Mr Moore has objected to the release of the information. The agency has taken Mr Moore's objection into account in the course of determining whether there is an overriding public interest against disclosure of the information, as is required by section 54(5) of the GIPA Act.

39. The Information Commissioner is satisfied that Mr Moore's objection is a relevant consideration against disclosure to be weighed in the application of the public interest test.

Contravene an information protection principle

40. The consideration at section 14 table 3(b) of the GIPA Act will apply if an agency can demonstrate that the release of the information could reasonably

be expected to contravene an information privacy principle or a health privacy principle, as set out in part 2 of the *Privacy and Personal Information Protection Act 1998* and schedule 1 of the *Health Records and Information Privacy Act 2002* respectively.

41. The agency decided that the disclosure of the information would contravene information privacy principle 11 (section 18 of the PPIP Act) which provides:

18 Limits on disclosure of personal information

- (1) A public sector agency that holds personal information must not disclose the information to a person (other than the individual to whom the information relates) or other body, whether or not such other person or body is a public sector agency, unless:
- (a) the disclosure is directly related to the purpose for which the information was collected, and the agency disclosing the information has no reason to believe that the individual concerned would object to the disclosure, or
 - (b) the individual concerned is reasonably likely to have been aware, or has been made aware in accordance with section 10, that information of that kind is usually disclosed to that other person or body, or
 - (c) the agency believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person.
- (2) If personal information is disclosed in accordance with subsection (1) to a person or body that is a public sector agency, that agency must not use or disclose the information for a purpose other than the purpose for which the information was given to it.

42. To show that information privacy principle 11 applies to the information requested by the applicant, it is necessary to establish whether the information constitutes “personal information” for the purposes of section 18 of the PPIP Act. The PPIP Act and GIPA Act contain different definitions of “personal information”. Section 14 table 3(b) of the GIPA Act does not expressly state which definition of personal information should be used in applying the consideration.

43. In the provisional view, the Information Commissioner favoured the use of the PIPP Act definition of “personal information”. After considering the agency’s submissions and further consultation with the NSW Privacy Commissioner, the Information Commissioner has decided that the definition contained in the GIPA Act, as the primary Act, should be used. This is supported by section 5 of the PPIP Act which states that “nothing in this Act affects the operation of the GIPA Act”.

44. Parts of the information requested by the applicant are Mr Moore’s personal information for the purpose of the GIPA Act (see [31]-[37]). Section 18 of the PIPP Act therefore applies to the information. None of the exceptions contained in that section apply, given Mr Moore’s objection to the release of the information. It follows that the consideration at section 14 table 3(b) of the GIPA Act is a relevant consideration to be applied in the public interest test.

45. However, the Information Commissioner does not accept the agency's submission that section 18 of the PPIP Act imposes an absolute prohibition against disclosure of the information. Section 11 of the GIPA Act states:

This Act overrides a provision of any other Act or statutory rule that prohibits the disclosure of information (whether or not the prohibition is subject to specified qualifications or exceptions), other than a provision of a law listed in Schedule 1 as an overriding secrecy law.

46. Personal information can be released under the GIPA Act, even if it would breach the PIPP Act. This is made clear by section 5 of the PIPP Act, which provides that nothing in that Act serves to lessen the obligations that agencies must exercise under the GIPA Act.

Expose a person to a risk of harm or of serious harassment or serious intimidation

47. The agency raised the consideration at section 14 table 3(f) of the GIPA Act. For the consideration to apply, an agency must show that the release of the information could reasonably be expected, from all of the circumstances, to expose a person to a risk of harm or serious harassment or serious intimidation.
48. The agency did not demonstrate how or why this consideration applies to the information. No reasons were given to support an application of this consideration and the agency has therefore not satisfied the requirements of section 61 of the GIPA Act (see G above).
49. The Information Commissioner is therefore not satisfied that the consideration at section 14 table 3(f) applies to the information requested by the applicant.

J Application of the public interest test

50. The following public interest considerations in favour of disclosure apply to the requested information:
- a. the public interest in the effective oversight of the expenditure of public funds;
 - b. the public interest in open and accountable government;
 - c. the public interest in open debate regarding the reappointment of a General Manager of a local council;
 - d. the general consideration in favour of disclosure (s12(2) of the GIPA Act), and
 - e. the presumption in favour of disclosure (s5 of the GIPA Act).
51. These are significant, weighty considerations.
52. The following considerations against disclosure apply to the requested information:

- a. parts of the information are personal information (section 14 table 3(a) of the GIPA Act);
 - b. the release of the information could contravene an information protection principle, namely section 18 of the PIPP Act (section 14 table 3(b) of the GIPA Act); and
 - c. the person to whom the personal information relates has objected to its disclosure (section 54 of the GIPA Act).
53. These are also important considerations.
54. The privacy considerations at section 14 table 3(a) and 3(b) of the GIPA Act are very important. However, in this instance the public interest considerations in favour of the release of the information are stronger. Mr Moore is engaged in the exercise of public functions and is a representative of the agency. He has been reappointed to the position of General Manager for a further five-year term, which strengthens the public interest in favour of the release of information that accounts for that decision and demonstrates that he is performing at the required standard.
55. While there are considerations against disclosure that apply to the information requested by the applicant, the Information Commissioner is not satisfied that they are strong enough to outweigh the presumption and further considerations in favour of disclosure. The Information Commissioner recommends that there is no overriding public interest against disclosure of this information and that the information should be disclosed to the applicant.

K Further comments

56. In submissions made to the Information Commissioner in response to the provisional view of 28 July 2011, the agency referred to section 10 of the *Local Government Act* and guidelines recently issued by the Division of Local Government as strong considerations against the release of the information.
57. Section 14(2) of the GIPA Act provides:
- The public interest considerations listed in the Table to this section are the only other considerations that may be taken into account under this Act as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information.
58. The agency did not demonstrate how the provisions can be taken into consideration under section 14 of the GIPA Act or operate in any other way within the Act. They are therefore not relevant considerations in the application of the public interest test.
59. The applicant and the agency have each considered the decision of the Administrative Decisions Tribunal (ADT) in *Diehm v Greater Taree City Council* [2010] NSWADT 233, which was made under the repealed *Freedom of Information Act 1989* (FOI Act).

60. ADT decisions provide useful guidance for the Information Commissioner, particularly where the provisions of the GIPA Act reflect the language and structure of the FOI Act. In this matter, however, the provisions of each Act are too different in both their language and structure for *Diehm v Greater Taree City Council* to have relevance to the construction of the GIPA Act. The exemption that applied to information relating to 'personal affairs' under the FOI Act is different from the 'personal information' provisions of the GIPA Act.
61. Further, *Diehm v Greater Taree City Council* [2010] NSWADT 233 does not provide guidance as to the release of a performance review and achievements. While the applicant in that matter did apply for that information, the agency did not hold it and therefore it was not addressed in detail by the ADT.

L Recommendations

62. The Information Commissioner makes the following recommendations in relation to the agency's decision:
- a. pursuant to section 94 of the GIPA Act, the Information Commissioner recommends against the agency's decision that there is an overriding public interest against disclosure of the information requested by the applicant;
 - b. pursuant to section 93 of the GIPA Act, the Information Commissioner recommends that the agency make a new decision by way of internal review within fifteen working days of the date of this report; and
 - c. pursuant to section 127 of the GIPA Act, the agency exercise its discretion to waive the internal review fee of \$40.00.

M Review rights

63. This review is now closed.
64. An applicant who is dissatisfied with the Information Commissioner's recommendations or an agency's response to those recommendations may seek a review of the original decision of the agency by the NSW Administrative Decisions Tribunal (**ADT**). An application for review by the ADT can be made any time up to four weeks from the date of this report. For more information in relation to ADT reviews, please contact the ADT on (02) 9223 4677.

If you would like further information please contact the IPC on 1800 472 679.