



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

Applicant:	Mr David Hill
Agency:	Port Stephens Council
OIC reference:	11-044
Date review request received:	17 February 2011
Date of final report:	22 December 2011

Summary of report

1. Mr David Hill requested access to information about money held by Port Stephens Council (the Council) following the sale of properties owned by third parties for unpaid rates. The Council refused access to this information on the grounds that it would breach an information protection principle under the *Privacy and Personal Information Protection Act 1998* (PIPP Act).
2. We have reviewed this decision and do not agree that there is an overriding public interest against disclosure of most of this information, because the information has previously been disclosed in another form, and either has been or will be required by law to be made publicly available.
3. We therefore recommend that the Council provide Mr Hill with access to the information he has requested.

Review by Information Commissioner

4. Mr David Hill is the proprietor of Diamond Funds Recovery, a company specialising in the search for and recovery of 'lost assets'. These 'lost assets' include money belonging to third parties held by various entities, including local councils. In many cases the third parties may not be aware that the entity holds their money, which is why they are considered to be 'lost'.
5. In December 2010 Mr Hill submitted a formal access application to the Council as follows:

I refer to the advertisement by this Council in the NSW Government Gazette dated 18/5/07 and 19/8/05 listing the land to be offered for sale by public auction (refer attached). Please provide me with an updated schedule showing the amounts which are now held by the Council as a credit for each landowner following a deduction from the sale proceeds for unpaid rates and charges.

6. The Council identified a record held by the Council's rating section as containing the information requested by Mr Hill.
7. On 5 January 2011 the Council notified Mr Hill of its decision to refuse access to the information he requested because it considered there was an overriding public interest against disclosure. This is a reviewable decision pursuant to section 80(d) of the GIPA Act.
8. The Council stated that the information requested was the personal information of third parties; that consultation was required, but could not be carried out because it had not been able to locate the third parties; and that to release the information would be a contravention of the PPIP Act. Council stated it was not able to contravene any information protection principles under the PPIP Act.
9. On 17 February 2011 we received a request for external review of the Council's decision from Mr Hill. In conducting this review we have had regard to:
 - the information provided by Mr Hill and the Council, including the Council file;
 - further information provided by the Council about its decision;
 - consultation with the Privacy Commissioner;
 - information provided by the Office of State Revenue; and
 - relevant provisions of the GIPA Act, the PPIP Act, the *Local Government Act 1993* and the *Unclaimed Money Act 1995*.

The public interest test

10. Mr Hill has a legally enforceable right to access the information he has requested unless there is an overriding public interest against disclosure of the information (section 9(1)).
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 the Council should begin with the general presumption in favour of disclosure of government information (section 5).
13. The Council must then:
 - identify and consider any further relevant public interest considerations in favour of disclosure;
 - identify any relevant public interest considerations against disclosure;

- determine the weight of the public interest considerations in favour of and against disclosure in accordance with the circumstances of the particular application; and
 - determine where the balance between those considerations lies.
14. Public interest considerations in favour of disclosure are not limited. However the Council can only consider the public interest considerations against disclosure set out in the table to section 14 of the GIPA Act. There are also limited categories of information where there is a conclusive presumption of an overriding public interest against disclosure. These are found in schedule 1 of the GIPA Act, and are not relevant for this review.
 15. The personal factors of the application may also be relevant considerations in the application of the public interest test, both in favour of and against disclosure (section 55).
 16. The Council must apply the public interest test according to the principles set out in section 15 of the GIPA Act.

Public interest considerations in favour of disclosure

17. The GIPA Act sets out some examples of public interest considerations in favour of disclosure in the notes to section 12(2), however public considerations in favour of disclosure are not limited to those listed in the Act. We encourage agencies to consider all the public interest considerations which may apply to a particular access application and to refer to these considerations in their notice of decision.
18. Although not referred to in its notice of decision, the Council informed the OIC that in its opinion the only possible public interest in favour of disclosure would be that the owners of the funds may be located, but appeared to consider that public interest consideration was lessened because the location of the owners would be done for the applicant's commercial benefit.
19. We consider there is ample evidence of a strong public interest in the public being aware of how agencies deal with their assets and of people becoming aware that agencies hold money to which they might be entitled. This can be seen by the legislation which governs how local government agencies recoup money owing to them for unpaid rates (*Local Government Act 1993*) and how enterprises, which include local councils, are required to deal with unclaimed moneys (*Unclaimed Money Act 1995*).
20. While it may be the case that Mr Hill has a private or commercial interest in obtaining access to the information he requested, we do not consider that this lessens the public interest in the owners of money becoming aware that Council holds that money. His pursuit of this interest may well serve the public interest, albeit by coincidence.
21. Council is entitled to take into account Mr Hill's identity, motives for making the access application and any other factors particular to the applicant in determining whether there is a public interest against disclosure (section 55(1)). However they can only be taken into account as factors against providing access if they are relevant to considering

whether disclosure of the information concerned could reasonably be expected to have any of the effects referred to in clauses 2 to 5 of the table to section 14. The Council has not done this.

Public interest considerations against disclosure

22. The only public interest considerations against disclosure which the Council may consider when applying the public interest test are those set out in the table to section 14 of the GIPA Act. If the Council wishes to rely on one of these considerations against disclosure it must establish that the disclosure of the information could reasonably be expected to have the effect outlined in the table.
23. Something which could reasonably be expected is something which is more than a mere possibility, risk or a chance. It must be based on real and substantial grounds. The Council therefore needs to:
 - identify the information
 - characterise it as information to which a public interest consideration against disclosure applies, and
 - demonstrate that disclosure of the information could reasonably be expected to have the effect deemed not to be in the public interest.
24. The Council has raised one public interest consideration against disclosure:

Section 14 Table 3(b) – contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998*.

25. In order to rely on this consideration against disclosure, Council must demonstrate a reasonable expectation that an information protection principle would be contravened by disclosure of the information, not simply assert that this would occur. In order to do so, the Council needs to specify which information protection principle would be contravened and show how disclosing the information would contravene that principle. Council has not done so.
26. We infer that the information protection principle to which the Council is referring is information protection principle 11, found in section 18 of the PPIP Act. which is that the Council can only disclose someone's personal information without their consent if:
 - a. the disclosure is for a related purpose and the Council has no reason to believe that the person would object to the disclosure, or
 - b. if the person was told at the time the information was collected from them that Council would do so, or
 - c. in order to deal with a serious and imminent threat to any person's health or safety.

27. There are a number of factors which suggest that the release of the requested information would not contravene this information protection principle or, if it did, that this consideration against disclosure would have insufficient weight to overturn the public interest in favour of disclosure. These factors relate to provisions of the *Local Government Act 1993* and the *Unclaimed Money Act 1995*. An explanation of these provisions and the sequence of events is useful.
28. The *Local Government Act* gives the Council the power to sell land held by third parties to recoup unpaid rates and charges. In this case the Council, as required by that Act, advertised its intention to sell several properties in the NSW Government Gazette and at least one newspaper. The details published included the name of the owner or person having interest in the land, a description of the land, the amount of rates and charges overdue for more than five years, the amount of all other rates and charges payable and unpaid, and the total amount due. The land was offered for sale by public auction.
29. As a result of the sale of various properties in this way, the Council was left with sums of money owing to the former owners whose land was sold in this way, being the balance of the proceeds of sale of the land after deduction of the unpaid rates and charges. Some of this money has still not been claimed by the people to whom it is owed.
30. When money has been held in this way for six years (or such shorter period as may be prescribed by regulation or otherwise approved) it becomes unclaimed money and must be dealt with according to the provisions of the *Unclaimed Money Act 1995*. That Act requires the Council to make reasonable efforts to ensure the owners are paid the money.
31. The Council has informed us that Council rates staff have already undertaken a number of searches, telephone calls and other enquiries to establish where the owners are and have been unable to locate them. For this reason, they have also been unable to consult those owners to ask whether they object to their details being disclosed to Mr Hill. However, if the Council had been able to contact them and inform them of the money owing to them, then it is likely they would have claimed that money, and their details would not fall within the scope of Mr Hill's application.
32. The *Unclaimed Money Act 1995* also includes provisions for payment of unclaimed money into the Consolidated Fund, and for the publication of information about, and the repayment of, unclaimed money to its rightful owners. Once the money held by Council becomes unclaimed money under that Act, the Council must lodge a return relating to that money in a form approved by the Chief Commissioner.
33. The Council is required to retain a copy of the return, and must make a copy of the return reasonably available for inspection by any person. The return must contain the owner's full name, the owner's last-known address, the total amount due to the owner, the year the money became payable to the owner, and the year the money became unclaimed. This is a public register.
34. Details about unclaimed money are publicly available via an online search facility on the Office of State Revenue (OSR) website. Those details include the name of the owner of the money, last known address, amount, description of the money, year and organisation. The OSR website states that internet access to unclaimed money

information is provided to assist owners locate and make a claim for their funds through the OSR. The only details needed to make a search are a name, however the searcher must agree that they will not use the information for any purpose other than its intended use, and not knowingly contravene the provisions of privacy legislation governing use of the information.

35. Owners have a limited time (6 years) to make a claim for money held in the Consolidated fund. If they are not aware that there is money to which they are entitled, then they will not be able to claim that money.
36. For the consideration against disclosure raised by the Council to apply, the Council firstly needs to show that the information to be disclosed is personal information as defined by the PPIP Act. Information about an individual that is contained in a publicly available publication is not personal information under the PPIP Act. Some of the information requested by Mr Hill has already been published in the NSW Government Gazette in 2005 and 2007 (the names of the property owners) and the land has been sold at public auction. Once the money becomes unclaimed money, and is sent to the OSR, all of the information will be placed on a public register.
37. The PPIP Act defines a public register as a register of personal information that is required by law to be, or is made, publicly available or open to public inspection. Section 57(1) of the PPIP Act provides that the Council must not disclose personal information kept in a public register unless it is satisfied that it is to be used for a purpose relating to the purpose of the register or the Act under which the register is kept.
38. Council has claimed that release of the requested information would be against Council's Privacy Management Plan. However, the Privacy Code of Practice for Local Government permits a council to allow inspection of a publicly available copy of a public register on council premises and the copying of a single page of the register without determining that the proposed use of the information is consistent with the purpose of the register. Council also has the option of requiring a statutory declaration as to the intended use of any information obtained from an inspection of a public register.
39. Further, section 25 of the PPIP Act provides that the Council is not required to comply with privacy principle 11 (section 18 of the PPIP Act) if it is lawfully authorised or required not to comply, or non-compliance is otherwise permitted, or is necessarily implied or reasonably contemplated under an Act or any other law. The provisions of the *Local Government Act* and *Unclaimed Money Act* referred to above imply that Council is not required to comply with privacy principle 11 in relation to details about unclaimed money.
40. For land sold in 2006, money held by Council is likely to become unclaimed some time in 2012, and for land sold in 2007 will become unclaimed in 2013.
41. Mr Hill has requested access to the names and amounts of money still owing to former property owners, whose names were published in the NSW Government Gazette and whose property was sold by public auction. We note that the record identified by the Council as containing the information requested by Mr Hill also contains other information which has not been publicly disclosed. This information could be redacted to overcome any overriding public interest against its release to Mr Hill.

Balancing the competing considerations

42. Council states in its notice of decision that it is not able to contravene the PPIP Act, and to release the information would contravene the legislation. This reasoning is not correct. This consideration, as with all the considerations against disclosure in the table to section 14, must be weighed when performing the public interest test; it is not an exemption that automatically prohibits disclosure. 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.

43. Personal information can be released under the GIPA Act, even if it would breach the PPIP Act. This is made clear by section 5 of the PPIP Act, which provides that nothing in that Act serves to lessen the obligations that agencies must exercise under the GIPA Act.
44. For the reasons already stated, even if the consideration against disclosure in clause 3(b) to the table in section 14 does apply to the information requested by Mr Hill, we consider that in view of the circumstances of this application, the weight of that consideration would not be sufficient to outweigh the general presumption in favour of disclosure of the requested information.

Final recommendation

45. We therefore recommend:
- a. The Council should make a new decision by way of internal review within 15 working days to provide access to the information requested by Mr Hill (names and amounts owing).
 - b. The Council should waive the \$40 fee payable for an internal review.
46. The Council should inform both Mr Hill and the OIC within 10 working days (that is, by 10 January 2012) of the actions it intends to take in response to this report.

Review rights

47. Our recommendations are not binding and cannot be reviewed under the GIPA Act. Mr Hill can ask the Administrative Decisions Tribunal (ADT) to review the Council's original decision if he is dissatisfied with:
- a. our recommendations, or
 - b. the Council's response to our recommendations,

48. He must make any such application up to four weeks from the date of this review (that is, by 19 January 2012). After this date the ADT can only review the decision if it agrees to extend that deadline.
49. If the Council makes a new reviewable decision as a result of our review, Mr Hill will have new review rights attached to the new decision. That is, he will have eight weeks from the date of the new decision to request an external review from us or from the ADT.
50. The ADT's contact details are:
 - Name: Administrative Decisions Tribunal
 - Address: Level 10, 86 Goulburn Street, Sydney, NSW, 2000
 - Telephone: (02) 9377 5711
 - Facsimile: (02) 9377 5723
 - Internet: <http://www.lawlink.nsw.gov.au/adt>
 - Email: ag_adt@agd.nsw.gov.au

Closing our file

51. This review is now closed.
52. If there are any questions about this review please contact the IPC on 1800 472 679.