



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

Applicant:	Mrs Iole Svir
Agency:	Blacktown City Council
OIC reference:	11-051
Date review request received:	23 February 2011
Date of this report:	14 December 2011

Summary of report

1. Mrs Svir seeks access to information about a neighbouring property and two development applications relating to that property. Blacktown City Council (Council) released some information to her and withheld other information because it decided that there is an overriding public interest against its disclosure.
2. During the course of this review, Blacktown reviewed its own decision and decided to release further information to Mrs Svir. Only 5 documents were withheld, and Council intends to release those to Mrs Svir once the development application that they concern is determined. We have reviewed that information and we are not satisfied that there is an overriding public interest against releasing the information now, for the reasons explained in this report. We therefore recommend that the information be released, except for any parts that are subject to legal professional privilege that has not been waived.
3. Mrs Svir submits that Council is not disclosing some information, in particular the details of a telephone call on 26th August 2009. She has provided some evidence that suggests there should be a record of that conversation. Council maintains that there is no such record. We recommend that Council redo its searches for that record, given the evidence provided by Mrs Svir, and if there is still no information found that the searches and results be explained to Mrs Svir.

Review by Information Commissioner

4. Mrs Svir made an application to Council on 22 November 2010 for information regarding development applications 08-615 and 09-2823, including all correspondence, reports, recommendations, notes, emails and other records about the applications and the property that they relate to. The access application was divided into 8 parts.
5. On 21 January 2011, Council released all of the information available in relation to parts 3, 4, 7 and 8 of the access application. We have not reviewed the decision to release information.
6. Council withheld some information identified in relation to parts 1,2, 5 and 6 of the access application because it decided that there is an overriding public interest against the disclosure of the information.
7. On 23 February 2011, Mrs Svir asked us to review Council's decision. In particular, she asked for a review of:
 - a. "whether there are any records in existence that relate to a telephone call on 26th August 2009 with a staff member of the then NSW Department of Water and Energy (DWE)
 - b. whether the council is justified in its claim that it would be against the public interest to disclose all records"
8. Mrs Svir nominated her son, Mr Daniel Svir, as her contact person during the review.
9. In conducting this review we have spoken with Mr Svir about the information that his mother seeks and the reasons for wanting the information. We have also spoken with Council, who provided us with a copy of their file in relation to the access application, including the information that was not released to Mrs Svir.

Further release of information

10. After reviewing the information that was withheld by Council, we spoke with Council about the information that was not released and the strength of the public interest considerations against its disclosure. We gave Council an opportunity to review its own decision and see if there was any more information that could be released.
11. On 1 December 2011, Council made a subsequent decision about the access application and released further information to Ms Svir. They have told us that they have released all of the information about DA 08-615 and the related property file, with only personal information redacted because of an overriding public interest its release. The redaction of personal information, such as names and signatures, is consistent with the approach that we recommend in OIC Guideline 3, which deals with personal information in development applications. The guideline is available on our website.

Information not released

12. Council decided not to release information about a development application that is yet to be determined by Council (DA-09-2823). There are five identified documents that contain the withheld information. Council intends to provide deferred access to the information by releasing it to Mrs Svir once the development application is determined.
13. Council decided that there is an overriding public interest against releasing the information at this point in time, as it could reasonably be expected to “reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given, in such a way as to prejudice a deliberative process of government or an agency” (section 14 table 1(e) of the GIPA Act).
14. We appreciate Council’s position on this, and the reasoning behind providing deferred access to the information. In theory, this consideration could apply to information of this type, given that the development application is still being determined, if disclosing the information would *prejudice* the deliberative process. If so, once a decision is made about the development application the consideration would be unlikely to continue to apply, as the release of the information could not reasonably be expected to prejudice a deliberative process that is already complete. Therefore, there would no longer be an overriding public interest against disclosure of the information and it could be released.
15. However, on review of the five documents not released to Mrs Svir, we are not satisfied that the consideration from section 14 table 1(e) of the GIPA Act does in fact apply to the information. While the information may reveal a deliberation or consultation conducted, or an opinion, advice or recommendation given about DA-09-2823, we cannot see how the release of the information would *prejudice* that deliberative process. Prejudice to the deliberative process does not arise simply because parts of that process are revealed, particularly where the information is factual in nature.
16. The release of the information could promote accountability and transparency in the deliberative process. This is particularly important when it comes to information about development applications, as the GIPA Act recognises the public interest in releasing that type of information. Most information about a development application is open access information and its release is mandatory (see sections 6 and 18 of the GIPA Act, and clause 3 of schedule 1 of the *Government Information (Public Access) Regulation* 2009). While the information withheld is not all open access information, there remains a strong public interest in favour of its release.
17. Given the strong public interest in favour of releasing the information, and the lack of public interest considerations against disclosure, we do not see that there is a need to provide deferred access to the information. We therefore recommend that Council consider releasing the remainder of the information to Mrs Svir now, and not later, unless it can demonstrate an overriding public interest against its disclosure.
18. We note, however, that Council may want to consider whether legal professional privilege applies to some parts of the information. If so, Council should consider whether it will waive that privilege in order to release the information (see schedule 1 clause 5(2) of the GIPA Act). If Council decides that parts of the information are legally privileged, those parts could be redacted in accordance with section 74 of the GIPA Act.

Information about a telephone conversation with staff of DWE

19. Ms Svir also seeks access to information about a telephone conversation on 26 August 2009, between a staff member of Council and a staff member of the DWE.
20. This information falls within part 2 of her access application, which requested all “records, correspondence, reports, recommendations, records of telephone calls, diary notes, emails and any other records relating to all communications between the Blacktown City Council and other relevant concurrent consent authorities from 2008 to date.”
21. Ms Svir has provided us with some evidence that the information should exist. Page 16 of Council’s report from 22 September discusses the referral of DA-08-615 to the DWE, and a conversation with a staff member on 26 August 2009.
22. We asked Council about this information. Council searched again on the relevant files and confirmed that it does not hold any information about such a telephone conversation. Given that Council’s report of 22 September 2011 refers to the conversation in question, we are not satisfied that Council does not hold any information about it.
23. We therefore recommend that Council conduct further searches for this information. If information is found, Council should make a decision under the GIPA Act about whether to release it to Ms Svir. If Council still cannot locate any information, Council should advise Ms Svir of the searches conducted, the fact that no information is held, and possible reasons for not holding the information despite the reference to it in the report.

Further comments

24. We note that Council did not provide Ms Svir with a schedule of documents with the original notice of decision. It did, however, provide her with one on request. While the GIPA Act does not require that a notice of decision contain a schedule of information released and withheld, we recommend that Council consider issuing schedules with their decisions. This makes the decision clearer for the applicant and the Council. It also satisfies the requirements of section 61(c) of the GIPA Act, which provides that an agency’s decision to refuse access to information must state the “general nature and the format of the records held by the agency that contain the information concerned.”

Our recommendations

25. We recommend:
 - a. under section 94, that there is no overriding public interest against disclosure of the remaining 5 documents and that Council release the information to Mrs Svir (subject to any consideration of legal professional privilege)
 - b. with respect to the telephone conversation with DWE:
 - Council refer to the report of 22 September 2011 and the telephone conversation mentioned in it,
 - Council conduct further searches for the information,

- if information is found, Council make a decision about the release of that information, following the requirements of the GIPA Act, and
- if no information is found, Council explain to Ms Svir the searches that were conducted and any reasons as to why there is no information despite a reference to it in the report of 22 September 2011.

26. We recommend that Council make a new decision, under section 93 of the GIPA Act, giving effect to the recommendations in this report. The new decision should be made within 15 working days of this report, that is, by 10 January 2012.

27. We ask Council to notify Mrs Svir and us, by 22 December 2011, of the actions it intends to take in response to our recommendations.

Review rights

28. Our recommendations 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 Administrative Decisions Tribunal (ADT) for a review of that decision.

29. If Mrs Svir is dissatisfied with:

- a. our recommendations, or
- b. Council's response to our recommendations

then Mrs Svir may ask the ADT to review the Council's original decision.

30. An application for ADT review can be made by 11 January 2012.

31. If Council makes a new reviewable decision as a result of our review, Mrs Svir will have new review rights attached to that decision. That is, she will have eight weeks from the date of the new decision to request an external review by the OIC or the ADT.

Questions

32. This review is now closed.

33. If you have any questions about this report please contact us on 1800 472 679.