



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

Applicant:	Applicant G
Agency:	University of New England
OIC reference:	11-246
Date review request received:	2 August 2011
Date of this report:	1 May 2012

Summary of this report

1. Applicant G, under the *Government Information (Public Access) Act 2009 (GIPA Act)*, requested access to information held by the University of New England (**the University**), which was conveyed via email by the group soci-academics@une.edu.au.
2. The University decided to release the majority of these emails, however decided there was an overriding public interest against disclosure of others.
3. We reviewed the University's notice of decision of 19 July 2011 and the GIPA file.
4. We recommend that the University:
 - Uphold its original decision regarding release of the emails by, or which include references to, the author who objected, pending his/her review rights; and
 - Reconsider partial release of the email dated 26 May 2011 or provide a detailed explanation as to why there is an overriding public interest consideration against its disclosure.
5. Further details and our reasons for these recommendations are set out below.

Our review

6. Applicant G made a formal access application to the University on 6 June 2011. He asked for the following information:

"All emails sent, forwarded or copied to soci-academics@une.edu.au from 1 January 2011 to 5 June 2011 inclusive, and a list of members, and who is the moderator."

7. The University consulted with Applicant G about the scope of his application, as searches for all emails in the specified date range returned voluminous results. Applicant G helped the University to narrow the scope of the searches to find the information he was most interested in.
8. On 19 July 2011, the University decided Applicant G's application and provided him with a notice of decision. His application was decided within the time provided for in the GIPA Act. The University released the following information to Applicant G:
 - a series of emails between 26-27 May 2011 that the University deemed relevant to applicant G's application, with some parts redacted;
 - the names of the moderators of soci-academics@une.edu.au; and
 - the names of the members of soci-academics@une.edu.au.
9. The University decided that there was an overriding public interest against disclosure of the information contained in one email dated 26 May 2011. That email was not released to Applicant G.
10. Some other information was redacted from the emails given to Applicant G, pending the review rights of relevant third parties. The University decided to release the information after any review rights had passed, in accordance with section 54(6) of the GIPA Act.
11. On 2 August 2011, applicant G asked us to review the University's original decision. The decision to provide access or refuse to provide access to information in response to an access application is a reviewable decision under section 80(d) of the GIPA Act.
12. When we discussed this matter with the University, it came to our attention that a third party had requested an internal review of the original decision and an internal review had been conducted.
13. On internal review, the University decided that there was an overriding public interest against disclosure of "*all of the government information requested in the GIPA application*". This was despite the fact that some of the information had already been released to Applicant G.
14. Section 82(4) of the GIPA Act provides:

There is to be no internal review of a decision that is or has been the subject of review by the Information Commissioner under this Part except internal review conducted on the recommendation of the Information Commissioner.
15. On 11 August 2011, we notified the University that the original decision was subject to an external review by the Information Commissioner and that the review request was received on 2 August 2011. There was an administrative delay on our part in notifying the University of the external review and we apologised for this.
16. However, given that the third party's request for internal review was made on 4 August 2011 and the decision was not made until 25 August 2011, the external review came first in time. The University should have advised us that there was an internal review request about the same decision when it received our notification.

17. We have therefore decided that the internal review decision is not valid and that the decision under external review is the University's original decision of 19 July 2011. We have, however, had regard to the University's internal review decision when conducting this review.

The public interest test

18. 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 disclosing the information.

19. Before deciding whether to release or withhold information, an agency must apply the public interest test to determine whether or not there is an overriding public interest against disclosure of the information.

20. 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.

21. The public interest test requires that the University undertake the following steps:

- identify any 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; and
- decide where the balance between those interests lies.

22. The public interest test must be applied in accordance with the principles set out under section 15 of the GIPA Act:

- agencies must exercise their functions so as to promote the object of the GIPA Act;
- agencies must have regard to guidelines issued by us;
- it is irrelevant if the disclosure of information might cause embarrassment to, or loss of confidence in, the agency;
- it is irrelevant that information disclosed might be misinterpreted or misunderstood; and
- disclosure, in response to formal access applications, cannot be made subject to any conditions on the use of the information.

Public interest considerations in favour of disclosure

23. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information. This consideration must always be weighed in the application of the public interest test. The nature and scope of other public interest considerations in favour of disclosure which may be relevant in the application of the public interest test are not prescribed [s12(2)GIPA Act]. However, they must be considerations which reflect the public interest, not mere individual considerations.
24. Although the University decided that Applicant G could have access to the majority of the requested emails, it did not clearly identify the presumption in favour of disclosing government information as prescribed in section 5 of the GIPA Act, nor did it explain any considerations in favour of disclosure. In fact, the only explanation the University provides for release of the subject emails is that they were judged as “*relevant to your GIPA Access Application*”.
25. The University could have provided more detail about the public interest factors it had considered in favour of release of the emails. The notes to section 12(2) of the GIPA Act set out some examples of public interest considerations in favour of disclosure. We consider the following public interest consideration is relevant in this application:
- the information is personal information of the person to whom it is to be disclosed.
26. In his access application, Applicant G states that he sought access to the subject emails, as he believes there were comments contained in the emails about himself and a unit he coordinates at the university.
27. Additionally, the University could have looked at personal factors of the application in accordance with section 55 of the GIPA Act as these factors may be relevant considerations in balancing the public interest test, including in favour of disclosure. Personal factors which may be taken into account include:
- the applicant’s identity and relationship with any other person;
 - the applicant’s motives for making the access application; and
 - any other factors particular to the applicant.

Public interest considerations against disclosure

28. The only public interest considerations against disclosure which may be considered in the application of the public interest test are those set out in the table to section 14 of the GIPA Act. To raise these as relevant considerations in the application of the public interest test the agency must establish that the disclosure of the information “...could reasonably be expected to havethe effect” outlined in the table.
29. The University identified one public interest consideration against disclosure, found in clause 3(a) of the table to section 14 of the GIPA Act.
30. Below are some comments in relation to the application of this.

Individual rights, judicial processes and natural justice- clause 3(a) of the table to section 14

31. The University reports in its notice of decision that the requested emails contained people's names, which is classified as personal information under clause 3(a) of the table to section 14 of the GIPA Act.

32. We refer the University to clause 4(3)(b) of Schedule 4 of the GIPA Act, which states:

Personal information does not include information (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.

33. Accordingly, the names and non-personal contact details contained in the emails that reveal nothing more than the fact that the people were engaged in the exercise of public functions should not be construed as personal information under the GIPA Act. Nevertheless, the University advised Applicant G that it received legal advice that in this context, the information included was more than the fact that the person was engaged in the exercise of public functions.

34. There is no further explanation provided regarding this and we are not satisfied that "receiving legal advice" is a sufficient reason to use clause 3(a) of table 14 as a public interest consideration against disclosure. Section 61 of the GIPA Act provides that:

Notice of an agency's 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.

35. The University also states "receiving legal advice" as a reason to refuse access to the email dated 26 May 2011, in accordance with clause 3 of table 14 of the GIPA Act, because its release risks affecting an individual's rights, judicial processes and natural justice. Again, the University does not explain how the release of this email is relevant to clause 3, or why there is an overriding public interest consideration against its disclosure.

36. We acknowledge however, that the University was prudent in consulting third parties whose names were contained in the subject emails (under section 54 of the GIPA Act) as this step would have assisted the University in its weighing and balancing of the public interest test.

Consultation on public interest considerations- section 54(6)

37. After consultation with the relevant third parties, the University found that of the six authors of the emails, five agreed to release of their emails to Applicant G (including their personal information) and one objected.

38. We also refer the University to paragraph 1.21 of our [Guideline - Consultation on public interest considerations under section 54 of the GIPA Act](#) in which it states:

The purpose of consultation is to find out the views of the third party and the basis for those views, which will inform the agency's ultimate decision about whether or not to release the information to the access applicant. It is not the role of the third party to decide if there is a public interest consideration against disclosure. Third party views are just one of the matters that an agency needs to consider in determining if any public interest considerations against disclosure apply, and if so, how significant they are.

39. Therefore, the views of third parties is just one of the factors the University needs to consider in deciding whether there are any public interest considerations against disclosure. A third party objection does not operate as an 'exemption' against the University deciding to release the information.

40. The University then decided to apply section 54(6) of the GIPA Act which states:

If consultation establishes that a person objects to the disclosure of information but the agency decides to provide access to the information in response to the application, access is not to be provided until the agency has first given the objector notice of the agency's decision to provide access to the information and notice of the objector's right to have that decision reviewed, and is not to be provided while review rights on the decision are pending.

41. In this instance, we agree that the University made the correct decision in not providing access to some of the emails so that any third parties had an opportunity to seek review of the original decision, that is, by way of internal review.

42. However, as explained previously in this report, the internal review was conducted simultaneously to our (Information Commissioner) review and under section 82(4) of the GIPA Act, there cannot be an internal review of a decision that is, or has been the subject of review by the Information Commissioner (except internal review conducted on the recommendation of the Information Commissioner).

43. As such, we have determined that the internal review is invalid and the objecting third party has the same review rights as Applicant G. More information regarding options for review is available at the end of this report. We recommend the University advise the third party of their review rights.

Balancing the public interest test

44. The GIPA Act does not provide a set formula for working out the weight of public interest considerations for or against disclosure or deciding if one set of considerations outweigh the other.

45. Whatever approach is taken, this is a question of fact and degree to which different answers may be given without being wrong (as long as the decision maker acts in good faith and makes a decision available to them under the GIPA Act).

46. We have considered and weighed the public interest factors for and against disclosure of the information and agree with the University that despite a third party objecting to release of the emails, this does not constitute an overriding public interest consideration against disclosure.

47. Thus we uphold this part of the University's decision and believe that all emails by, or which include references to, the author who objected, should be released in full, pending any review rights available to any third party who has objected to its disclosure.

48. We now refer to the email dated 26 May 2011 (Number 7 in the Schedule of Documents) and note that the University's general comment that it received "legal advice" that the release of this email risks affecting an individual's rights, judicial processes and natural justice (clause 3 of table 14 of the GIPA Act) is not sufficient as an overriding public interest consideration against its disclosure. As such, we recommend that the University reconsider partial release of this email or give a more detailed explanation as to why there is a public interest consideration against its disclosure in accordance with section 61 of the GIPA Act.

Our recommendations

49. We recommend that the University:

- Uphold its original decision regarding release of the emails by, or which include references to, the author who objected, pending his/her review rights (section 92 of the GIPA Act); and
- Reconsider partial release of the email dated 26 May 2011, or provide a satisfactory explanation as to why it considers there to be an overriding public interest consideration against its disclosure (section 93 and 92 of the GIPA Act).

50. We ask that the University advise Applicant G and us by **8 May 2012** of the actions it intends to take in response to our recommendations.

Review rights

51. 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.

52. Applicant G may ask the ADT to review the original decision of the agency if he is dissatisfied with:

- our recommendations, or
- the University's response to the recommendations.

53. Applicant G may ask the ADT to review the original decision of the agency.

54. An application for ADT review can be made up to 20 working days from the date of this report. After this date, the ADT can only review the decision if it agrees to extend this deadline.

55. For information about the process and costs associated with a review by the ADT, please contact the ADT. The ADT's contact details are:

Administrative Decisions Tribunal
Level 10, 86 Goulburn Street,
Sydney, NSW, 2000
Telephone (02) 9377 5711

Facsimile (02) 9377 5723

TTY (02) 9377 5859

Internet <http://www.lawlink.nsw.gov.au/adt>

e-mail ag_adt@agd.nsw.gov.au

56. If the University makes a new reviewable decision as a result of our review, Applicant G 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 OIC or ADT.

Closing our file

57. This review is now closed.

58. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.

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