



**Report under the
*Government Information (Public Access) Act 2009***

Applicant:	Ms Mary Haire
Agency:	Leichhardt Council
OIC reference:	IPC12-000289
Date review request received:	27 June 2012
Date of this report:	16 November 2012

Summary of report

1. Ms Haire applied to Leichhardt Council (**Council**) under the *Government Information (Public Access) Act 2009 (GIPA Act)* for access to a particular drainage report prepared by Gubler & Associates Pty Ltd (**Gubler report**).
2. Council refused Ms Haire access to the Gubler report, as it decided there was an overriding public interest against disclosure of the information contained in the report.
3. We considered the decision made by Council and examined the GIPA file provided by Council and some information provided by Ms Haire. We are not satisfied that Council has applied the public interest test or that its notice of decision complies with the requirements set out in section 61 of the GIPA Act.
4. We recommend that Council review the information contained in the Gubler report and make a new decision. Our reasons are explained in this report.
5. We ask that Council advise us and Ms Haire by **30 November 2012** of the actions it intends to take in response to our recommendations.

Background to our review

6. Between the properties at 228-230 Trafalgar Street Annandale is a paved path. This path is used by the owner to access the property at 228 Trafalgar Street. The owner of 228 Trafalgar Street is confined to a wheelchair and is also a client who is managed by the NSW Trustee & Guardian (**TAG**).
7. Ms Haire resides at 230 Trafalgar Street and alleges that water runoff from this path is entering her residence via air vents, which is causing damage to her property. Consequently, Ms Haire complained to Council, who in July 2011, served the TAG with an Order to remove the paved path.
8. In response to the Order served by Council, TAG engaged a drainage consultant, resulting in the commissioned Gubler report (information sought by Ms Haire).
9. In February 2012 Council wrote to Ms Haire and advised her that both TAG and Council had “engaged drainage engineers to assess the situation”. Council’s letter listed three conclusions, none of which included a finding that water runoff from the path is being directed under 230 Trafalgar via air vents. Council also told Ms Haire that having regard to the pavers existing on her property and that the ‘blocked vents may be only one of the causes’ of her damp problem, it was not in a position to pursue the Order.
10. On 21 March 2012 Ms Haire lodged an access application with Leichhard Council, seeking access to:
 - E. Gubler’s drainage report re 228 Trafalgar St (2011); * Referenced in Compliance Manager Vogt’s Letter to me of 22/2/12.
11. In its notice of decision dated 2 May 2012, Council advised Ms Haire it had decided to refuse her access to the Gubler report, as there was an overriding public interest against its disclosure.

Our review

12. On 27 June 2012 Ms Haire asked us to review the decision made by Council to refuse access to the Gubler report.
13. In conducting this review we have:
 - a. examined the Council’s GIPA file;
 - b. examined the information provided to us by Ms Haire;
 - c. examined the notice of decision dated 2 May 2012;
 - d. spoken with the parties about the information sought by Ms Haire.

14. This report addresses:
 - a. Council's application of the public interest test to the information sought by Ms Haire;
 - b. Council's notice of decision and its compliance with section 61 of the GIPA Act.

The public interest test

15. 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 (section 9(1) of the GIPA Act).
16. Before deciding whether to release or withhold information, Council must apply the public interest test.
17. 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.
18. In *Nature Conservation Council of NSW v Department of Trade and Investment, Regional Infrastructure and Services* [2012] NSWADT 195, Judicial Member Montgomery at paragraph 29 recognised that the test in section 13 of the GIPA Act requires decision makers to:
 - (i) identify relevant public interest considerations in favour of disclosure,
 - (ii) identify relevant public interest considerations against disclosure,
 - (iii) attribute weight to each consideration for and against disclosure, and
 - (iv) determine whether the balance of the public interest lies in favour of or against disclosure of the government information.
19. Council must apply the public interest test in accordance with the principles set out under section 15 of the GIPA Act:
 - a. agencies must exercise their functions so as to promote the object of the GIPA Act;
 - b. agencies must have regard to guidelines issued by the Information Commissioner;
 - c. it is irrelevant if the disclosure of information might cause embarrassment to, or loss of confidence in, the agency;
 - d. it is irrelevant that information disclosed might be misinterpreted or misunderstood; and

- e. 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

- 20. Section 12(1) of the GIPA Act provides that there is a general public interest in favour of the disclosure of government information. This consideration must always be weighed in the application of the public interest test.
- 21. 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 limited (section 12(2) GIPA Act).
- 22. In its notice of decision the Board identified the statutory presumption in favour of disclosing government information, but it did not identify any other considerations in favour of disclosure. The considerations identified by Council are as follows:
 - 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. the information is personal information of the person to whom it is to be disclosed.
- 23. Ms Haire told us that she considers there is a clear public interest in disclosing to her a report that directly affects her personal affairs and property.
- 24. In addition to those public interest considerations in favour of disclosure identified by Council we are of the opinion that the following considerations in favour of disclosure also apply:
 - a. disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;
 - b. disclosure of the information could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law and their dealings with agencies;
 - c. disclosure of the information could reasonably be expected to contribute to the administration of justice generally, including procedural fairness.
- 25. In Ms Haire's view, her neighbour's raised path and garden are responsible for the damage incurred by her property, which includes:
 - o cracked walls
 - o a collapsed toilet and toilet floor
 - o rotten floorboards
 - o rotten wooden dividing wall
 - o kitchen floor permanently marked and soaked when it rains

- damage to the waste drain
26. We are of the view there is a significant public interest in the disclosure of information that informed Council's decision not to pursue the enforcement of an Order that it had previously decided to issue.
27. When writing its decision Council should not only identify those public interest considerations in favour of disclosure it considers apply, but also explain how they apply and what weight it attributes to those considerations and why.

Public interest considerations against disclosure

28. Unlike the public interest considerations in favour of the disclosure of government information which are not limited, the public interest considerations against disclosure are limited to those considerations set out in:
- schedule 1 to the GIPA Act (information for which there is a conclusive presumption of an overriding public interest against disclosure), and
 - section 14 of the GIPA Act (public interest considerations against disclosure).
29. Before applying a consideration against disclosure to the information, Council must:
- a. identify the information;
 - b. characterise it as information to which a public interest consideration against disclosure applies, and
 - c. demonstrate that disclosure of the information could have the effect deemed not to be in the public interest.
30. In its notice of decision Council listed nine public interest considerations against disclosure that it stated 'outweigh the two public interest considerations' in favour of disclosure. These considerations are set out in the table at section 14 of the GIPA Act and provide that there is a public interest against disclosure of information if disclosure of the information could reasonably be expected to:
- clause 1(d) - prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions (whether in a particular case or generally);
 - clause 1(e) - 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 (whether in a particular case or generally);
 - clause 1(g) - found an action against an agency for breach of confidence or otherwise result in the disclosure of information provided to an agency in confidence (whether in a particular case or generally);
 - clause 1(h) - prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed; and whether in a particular case or generally);

- clause 2(b) - prejudice the prevention, detection or investigation of a contravention or possible contravention of the law or prejudice the enforcement of the law (whether in a particular case or generally);
 - clause 3(a) – reveal an individual’s personal information;
 - clause 3(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*;
 - clause 3(c) – prejudice any court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings;
 - clause 4(e) – prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).
31. Listing public interest considerations against disclosure (alone) are not of themselves reasons for refusing access to information. If Council raises a public interest consideration against disclosure, they need to show the elements of the consideration apply before they apply the public interest test.
 32. If any of the elements of a public interest consideration against disclosure are not met, the consideration does not apply. A public interest consideration against disclosure only applies to such information if it meets all of the elements of the consideration.
 33. Once the elements have been met, Council can proceed to considering the weight of the consideration and whether or not it overrides the public interest considerations in favour of disclosure (either on its own or in conjunction with other public interest considerations against disclosure).
 34. We have provided further guidance about one of the public interest considerations raised by Council, below, to assist Council to identify the elements of each consideration.

Prepared for legal proceedings

35. In its notice of decision Council listed clause 3(c) of the table at section 14(2) of the GIPA Act which provides that there is a public interest 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

36. Council’s notice of decision also provides a brief explanation as to why the information was refused. This paragraph states:

The report requested was provided to Council specifically in relation to a matter pertaining to a works order issued by Council. The report was obtained and paid for by the owner of 228 Trafalgar Street, Annadale and provided to Council for a limited purpose which does not include unauthorised disclosure to third parties.

37. It is not immediately clear which of the nine public interest considerations against disclosure this explanation might apply to. However, Ms Haire told us that two reports (including the Gubler report) were obtained: one by TAG and the other by Council, after Council issued the Order.
38. We understand that it is available to a Council, seeking to enforce an Order, to take proceedings in a relevant court for an order to remedy or restrain a breach of the relevant Act or Regulation. Therefore it would stand to reason that the parties to any such legal proceedings would be Council and TAG (on behalf of its client). However, prior to Ms Haire making an access application under the GIPA Act on 21 March 2012, Council had written to Ms Haire on 22 February 2012 advising her that Council was not in a position to pursue the enforcement of the Order.
39. Ms Haire told us that in January 2012 her lawyers wrote to TAG, not Council, in an attempt to avoid legal proceedings. The fact that she has engaged a lawyer is not enough to show or substantiate reliance upon this public interest consideration against disclosure.
40. Clause 3(c) of the table at section 14(2) of the GIPA Act is expressed in substantially similar terms to clause 11(b) of Schedule 1 of the *Freedom of Information Act 1989 (FOI)*. The *NSW FOI Manual* by the NSW Department of Premier and Cabinet and the NSW Ombudsman states that the purpose of clause 11(b) of the FOI Act (whilst previously an exemption) is to ensure that the smooth functioning of courts is not compromised. Consequently, if Council seek to rely on this consideration against disclosure it must show in its notice of decision that the following are met:
 - which court proceedings the information was prepared for; and
 - how the court proceedings would be prejudiced if the information was revealed.
41. We recommend that Council reconsider its decision to refuse Ms Haire access to the Gubler report and apply the public interest test. If Council then decides there is an overriding public interest against disclosure of the report to Council, it should consider the appropriate provisions set out in the GIPA Act (including sections 72(1) & 72(2)(d), 73(2), 74, 75, 76 and 78), to avoid an overriding public interest against disclosure.

Personal factors of the application

42. Under section 55, the personal factors of the application are only relevant considerations against disclosure if (and only to the extent that) those factors are relevant to the agency's consideration of whether the disclosure of the information concerned could reasonably be expected to have any of the effects referred to in clauses 2–5 (but not clauses 1, 6 or 7) of the table to section 14.
43. Ms Haire told us that she requires access to the Gubler report to assist her in understanding why Council relied on a report obtained by TAG, to the extent that it would not pursue the Order, as she is not convinced that the report obtained by Council supports the three conclusions set out in a letter from Council's Compliance Manager to her on 22 February 2012.

Third party consultation

44. Under section 54 of the GIPA Act, Council may also be required to consult third parties if the information is of a kind requiring consultation. Council must take any third party objection into account in making its decision, however an objection is not in itself determinative of an overriding public interest consideration against disclosure.
45. Council may decide to release information despite receiving an objection from a third party. However under section 54(6) and (7) Council must notify the third party of its decision, and not release the information until the third party's review rights have expired.

Balancing the public interest

46. 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.
47. Council should apply the public interest test in the way set out in paragraphs 15-19 of this report.
48. If at this stage Council considers that there is an overriding public interest against disclosing the information, the GIPA Act contains a number of provisions that may apply to mitigate the effect of, or reduce the weight of, public interest considerations against disclosure or even avoid an overriding public interest consideration against disclosure altogether (see for example sections 72 to 78 of the GIPA Act).
49. It is consistent with the objects of the GIPA Act that these provisions be considered, where relevant, before a decision is made to not disclose information because there is an overriding public interest consideration against disclosure.
50. Once all of the above steps have been finalised, Council should explain its reasons for the decision to the applicant. If Council decides that there is an overriding public interest against disclosing the information its notice of decision must meet the notice requirements in section 61 of the GIPA Act.
51. To assist Council in applying the public interest test, we attach our published seminar resource *How to apply the public interest test* and a notice of decision template.

Requirements for notices of decisions

52. Section 61 of the GIPA Act sets out the requirements for a notice of decision when an agency refuses to release information falling within the scope of an access application.
53. Council's notice of decision has not complied with section 61 of GIPA Act because:
 - a. it does not include detailed reasons for its decision;

- b. it does not include findings on any key questions of fact, and the source of the information on which the findings are based; and
 - c. it does not include a schedule of the documents identified as falling within the scope of Ms Haire's application.
54. To assist Council, we have provided further detail about the requirements of notices of decisions in **Attachment A** to this report.

Our recommendations

55. We recommend Council:
- a. in accordance with section 93 of the GIPA Act, make a new decision by way of internal review within 15 working days from the date of this report (subject to any permissible extensions under the GIPA Act). There is no fee payable in accordance with section 93(6) of the GIPA Act;
 - b. apply the public interest test to the Gubler report and provide access to the information unless there is an overriding public interest against disclosure; and
 - c. if it decides to refuse access to part or all of the information requested, provide the general nature and format of the records containing the information falling within the scope of Ms Haire's request, and provide reasons for the refusal as required by section 61 of the GIPA Act.

Review rights

56. 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.
57. If Ms Haire is dissatisfied with:
- a. our recommendations, or
 - b. Council's response to the recommendations,

Ms Haire may ask the ADT to review the original decision of the Council.

58. 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. 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

46. If Council makes a new reviewable decision as a result of our review, Ms Haire 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

47. This file is now closed.
48. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679..

Level 11, 1 Castlereagh Street, Sydney NSW 2000 • GPO Box 7011, Sydney NSW 2001
t 1800 INFOCOM (1800 463 626) • f 02 8114 3756 • e oicinfo@oic.nsw.gov.au
www.oic.nsw.gov.au