



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

Applicant: Sheryll Young  
Agency: Ku-ring-gai Council  
Report date: 16 March 2015  
IPC reference: IPC15/R000056  
Keywords: Government information – business interests of agencies

### Contents

Contents.....	1
Summary.....	2
Background.....	2
Decision under review .....	2
The public interest test.....	3
Public interest considerations in favour of disclosure.....	3
Public interest considerations against disclosure .....	3
Consideration 4(c) - diminish the competitive commercial value of any information to any person .....	4
Consideration 4(d) - prejudice any person's legitimate business, commercial, professional or financial interests .....	5
Balance of the public interest.....	5
Recommendations .....	6
Review rights .....	6
Completion of this review.....	7

## Summary

1. Sheryll Young (the Applicant) applied for information from the Ku-ring-gai Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to provide access to some information, that some information is already available to the public, and that there is an overriding public interest against disclosure of other information.
3. The Information Commissioner recommends that the Agency reconsider the decision by way of internal review. Reasons are outlined in this report.

## Background

4. The Applicant applied under the GIPA Act to the Agency for access to:  
*Copy of the documents to item C.2. OMC 9 December 2014. Including attachment 1 to 11, and the decision, and the recommendation.*
5. In its decision issued on 27 January 2015, the Agency decided to provide access to the attachments 1 to 11, to the item C.2, which is a confidential Agency report titled 'Acquisition of Land Gordon - Hardship Application'.
6. The Agency stated that it decided to provide the attachments on the basis that the Agency has previously provided the attachments to the Applicant in dealing with the Applicant in this matter.
7. In its notice of decision, the Agency decided that its decision or resolution in relation to the confidential report is already available to the public on the Agency's website in its meeting agendas and minutes.
8. In the Agency's meeting minutes on 9 December 2014 regarding the Acquisition of Land Gordon - Hardship Application it states that:  
*The matter is classified confidential because it deals with the proposed acquisition and/or disposal of property.*  
*It is not in the public interest to release this information as it would prejudice Council's ability to acquire and/or dispose of the property on appropriate terms and conditions.*
9. In its notice of decision, the Agency decided to refuse to provide access to the confidential report on the basis of an overriding public interest against disclosure.
10. In seeking a review of the decision by the Information Commissioner, the Applicant confirmed that they are seeking a copy of the full report making the recommendation to the Agency.
11. The Applicant advised the Information Commissioner that they seek the information to explain the Agency's actions in relation to the acquisition of the Applicant's home.

## Decisions under review

12. The decision under review is the Agency's decision to refuse to provide access to information in response to an access application.



## The public interest test

13. The Applicant 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). The public interest balancing test for determining whether there is an overriding public interest against disclosure is set out in section 13 of the GIPA Act.
14. The general public interest consideration in favour of access to government information set out in section 12 of the GIPA Act means that this balance is always weighted in favour of disclosure. Section 5 of the GIPA Act establishes a presumption in favour of disclosure of government information.
15. Before deciding whether to release or withhold information, the Agency must apply the public interest test and decide whether or not an overriding public interest against disclosure exists for the information.
16. Section 13 requires decision makers to:
  - a. identify relevant public interest considerations in favour of disclosure,
  - b. identify relevant public interest considerations against disclosure,
  - c. attribute weight to each consideration for and against disclosure, and
  - d. determine whether the balance of the public interest lies in favour of or against disclosure of the government information.
17. The Agency must apply the public interest test in accordance with the principles set out in section 15 of the GIPA Act.

## Public interest considerations in favour of disclosure

18. Section 12(1) of the GIPA Act sets out a general public interest in favour of disclosing government information, which must always be weighed in the application of the public interest test. The Agency may take into account any other considerations in favour of disclosure which may be relevant (s12(2) GIPA Act).
19. In its notice of decision, the Agency provided the following public interest consideration in favour of disclosure of the information in issue:

*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.*
20. The Agency has not attributed a weight to its consideration in favour of disclosure.

## Public interest considerations against disclosure

21. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
22. In order for the considerations against disclosure set out in the table to section 14 of the GIPA Act to be raised as relevant, the Agency must establish that the disclosure of the information *could reasonably be expected to have the effect* outlined in the table.
23. The words "could reasonably be expected to" should be given their ordinary meaning. This requires a judgment to be made by the decision-maker as to

whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect the effect outlined.

24. In its notice of decision, the Agency raised two public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
  - a. diminish the competitive commercial value of any information to any person (clause 4(c) of the table to section 14 of the GIPA Act); and
  - b. prejudice any person's legitimate business, commercial, professional or financial interests (clause 4(d) of the table to section 14 of the GIPA Act).
25. I will discuss each of these considerations in turn.

#### **Consideration 4(c) - diminish the competitive commercial value of any information to any person**

26. Clause 4(c) of the table to section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:*

*...*

*diminish the competitive commercial value of any information to any person.*

27. In order to rely on this clause as a consideration against disclosure, an agency must show that releasing the information could reasonably be expected to have the effect outlined in clause 4(c) and base this on substantial grounds.
28. The definition of the phrase "could reasonably be expected to" means more than a mere possibility, risk or chance and must be based on real and substantial grounds and not be purely speculative, fanciful, imaginary or contrived.
29. In particular, an agency must identify why the information has a competitive commercial value, and how that value would be adversely affected if the information was disclosed.
30. In its notice of decision, the Agency stated that *disclosure of Council's confidential report at this time may reasonably serve to hinder Council's current actions to acquire the property (33 Moree Street Gordon) pursuant to the Land Acquisition (Just Terms Compensation) Act 1991.*
31. The Agency in making its decision has not adequately identified why the information has a competitive commercial value and how the value of the information would be adversely affected if the information was disclosed.
32. We have viewed the Agency's confidential report for which the Agency states that there is a public interest consideration against disclosure.
33. While it appears that the Agency may have raised a relevant public interest consideration against disclosure, in its notice of decision the Agency has not adequately set out the general nature of the information in the confidential report that this consideration applies to nor does it fully demonstrate why the consideration applies. Similarly the decision does not attribute a weight to the public interest consideration against disclosure.



34. The Information Commissioner is therefore not satisfied that the decision to apply this consideration is fully justified.

#### **Consideration 4(d) – business interests**

35. Clause 4(d) of the table to section 14 of the GIPA Act provides:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:*

...

*prejudice any person's legitimate business, commercial, professional or financial interests.*

36. In order to rely on this clause as a consideration against disclosure, an agency must show that releasing the information could reasonably be expected to have the effect outlined in clause 4(d) and base this on substantial grounds.
37. The definition of the phrase "could reasonably be expected to" means more than a mere possibility, risk or chance and must be based on real and substantial grounds and not be purely speculative, fanciful, imaginary or contrived.
38. In particular, an agency must identify the party whose interests would be prejudiced, and the relevant interest/s. In order to justify the application of the consideration, an agency must demonstrate the causal nexus between the disclosure of the information and the prejudice to that interest.
39. In its notice of decision, the Agency stated that *disclosure of Council's confidential report at this time may reasonably serve to prejudice Council's legitimate commercial and financial interest in the acquisition of this property.*
40. The Agency in making its decision has not demonstrated how the disclosure of information in the confidential report could reasonably be expected to prejudice the Agency's commercial and financial interest in the acquisition of the property.
41. We have viewed the Agency's confidential report for which the Agency states that there is a public interest consideration against disclosure.
42. While it appears that the Agency may have raised a relevant public interest consideration against disclosure, in its notice of decision the Agency has not adequately set out the general nature of the information in the confidential report that this consideration applies to nor does it fully demonstrate why the consideration applies. Similarly the decision does not attribute a weight to the public interest consideration against disclosure.
43. The Information Commissioner is therefore not satisfied that the decision to apply this consideration is fully justified.

#### **Balance of the public interest**

44. 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.

45. A recent NSW Civil and Administrative Tribunal (NCAT) decision helpfully stated that:
- It is really a matter of placing identified considerations in order of priority or importance.<sup>1</sup>*
46. In its notice of decision, the Agency stated that it has considered the relevant public interest considerations in favour of and against disclosure of the information requested by the Applicant.
47. The Agency stated that it has applied the public interest test and decided that there is an overriding public interest against disclosure of some of the information requested.
48. The Information Commissioner has considered the Agency's notice of decision and the confidential report that the Agency has refused access, and has found that the Agency has not adequately set out or weighted the public interest considerations for and against disclosure before balancing the public interest.
49. The Information Commissioner is therefore not satisfied that the Agency has justified its decision in accordance with section 97 of the GIPA Act.

## Recommendations


50. The Information Commissioner recommends under section 93 of the GIPA Act that the Agency make a new decision.
51. In making a new decision, have regard to the matters raised and guidance given in this report.
52. We ask that the Agency advise the Applicant and us by **30 March 2015** of the actions to be taken in response to our recommendations.

## Review rights

53. Our reviews 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 NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.
54. The Applicant has the right to ask the NCAT to review the Agency's decision.
55. An application for a review by the NCAT can be made up to 20 working days from the date of this report. After this date, the NCAT can only review the decision if it agrees to extend this deadline. The NCAT's contact details are:
- NSW Civil and Administrative Tribunal  
Administrative and Equal Opportunity Division  
Level 10, John Maddison Tower  
86-90 Goulburn Street,  
Sydney NSW 2000
- Phone: 1300 006 228  
Website: <http://www.ncat.nsw.gov.au>
56. If the Agency makes a new reviewable decision as a result of our review, the Applicant will have new review rights attached to that new decision, and 40

---

<sup>1</sup> *Mannix v Department of Education and Communities* [2014] NSWCATAD 35 at [63]



working days from the date of the new decision to request an external review at the IPC or NCAT.

### **Completion of this review**

- 57. This review is now complete.
- 58. If you have any questions about this report please contact the Information and Privacy Commission on 1800 472 679.

Elizabeth Tydd  
**Information Commissioner**