

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

Applicant: Applicant
Agency: Queanbeyan City Council
Report date: 17 May 2016
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Summary

1. The Applicant applied for information from the Queanbeyan City Council (the Agency) under the Government Information (Public Access) Act 2009 (GIPA Act).
2. The Agency decided:
 - a. to provide access to some of the information on 28 September 2015 pursuant to section 58(1)(a) of the GIPA Act;
 - b. to refuse access to some information on 28 September 2015;
 - c. to provide access to additional information on 30 September 2015, 26 October 2015, 28 October 2015 and 18 April 2016, pursuant to section 58(3) of the GIPA Act;
 - d. on 26 October 2015, that some information is not held, pursuant to section 58(1)(b) of the GIPA Act; and
 - e. to refuse access to some information on 18 April 2016 because of an overriding public interest against its disclosure, pursuant to section 58(1)(d) of the GIPA Act.
3. The Information Commissioner is not satisfied that the Agency's decisions at paragraphs 2b and 2e above are justified, pursuant to section 97(1) of the GIPA Act.
4. The Information Commissioner recommends that:
 - a. the Agency make a new decision by way of internal review pursuant to section 93 of the GIPA Act with respect to Emails 9, 10 and 17, and in doing so, note the guidance in this report; and
 - b. in dealing with future GIPA applications, the Agency adopt the guidance in this report at paragraphs 26, 29, 34, 44, 52, 66, 70, 72 and 75, with respect to its general procedures for dealing with GIPA applications, pursuant to section 95 of the GIPA Act.

Background

5. On 9 September 2015, the Applicant applied under the GIPA Act to the Agency for access to all documents in relation to the 27 Myrtle Crescent Fence Matter, from 12 February 2014 to date, in particular:
 - a. what are the 'good reasons' that further correspondence on this matter would be placed on file and not responded stated by the former GM, Mr Chapman, in his letter of 13 May 2014 and in the Council's Business Paper of the Ordinary Meeting of 28 May 2014;
 - b. sight distance calculations made by Mr Hansen; and
 - c. the proposed solution, correspondence with my neighbour (the owners of 27 Myrtle Crescent, Queanbeyan) and the decision made under closed session in the Ordinary Meeting of 27 May 2015.
6. In its undated decision which appears to have been emailed to the Applicant on 28 September 2015, the Agency decided:

- a. to provide access to some information, comprised of 22 records with a TRIM reference, and 18 emails or SMS messages;
- b. that sight distance calculations will be advised separately when information [is] received; and
- c. that the following information was subject to third party consultation and that “pending responses, additional material may be provided.”

Item	Date/Time	Sender	Recipient	Notation
C1550217	19/2/15	Survey Advice	M Thompson	Redacted for third party consultation
C1562705	6/5/15	Dept of Planning	H Percy	Safety concerns with site – redacted for third party consultation
Email 9	1/9/15	Property owners	P Tegart	Advice on fencing issue – redacted for third party consultation
Email 10	7/9/15	P Tegart	Property owners	Advice after discussions – part redacted for third party consultations
Email 17	21/9/15	P Tegart	Property owners	Request for progress – part redacted for third party consultations

7. On 30 September 2015, the Agency provided additional information to the Applicant, the “Report that went to the Council meeting on 27 May 2015.”
8. On 9 October 2015, the Applicant wrote to the Agency, stating that there were particular documents which had not been provided, including:
 - a. Councillor’s emails to him, other Councillors and Council staff;
 - b. emails between himself and Mr Percy;
 - c. documents leading to the Council’s Ordinary meeting of 28 May 2014, for example the CARS (Customer Action Requests); and
 - d. the sight distance calculations.

The Applicant also requested that the following particular information be provided to him:

- e. notes of the meeting between Mr Percy and the Chamber Magistrate, Queanbeyan Courthouse;
- f. notes on the discussion that Mr Percy and the GM Southern Region Planning Services [sic];
- g. letter that was received from GM Southern Region Planning Services, including the suggestion forwarded for replacing a section of the fence with a pool style fence;
- h. photos provided as part of the suggestion;

- i. dates of the alleged considerable consultation between the owner/s of 25 Myrtle Crescent and the Council;
 - j. the email sent to the owner of 27 Myrtle Crescent stating the proposition to resolve this matter;
 - k. the document from the GM Southern Region Planning Services that confirms that the fence is compliant; and
 - l. a clear chronology of events.
9. On 26 October 2016, the Agency provided its response, which included requested items listed at paragraphs 8b and 8d.
- With respect to item 8a, the Agency said: *All relevant emails captured in the Council's records management system have been provided. Councillors' private emails are not recorded in this system.*
- With respect to item 8c, the Agency said: *If a CARS is located it will be provided.*
- With respect to items 8e, 8f, 8g, 8h, 8i, 8k the Agency stated that no such records were detected. With respect to item 8j the Agency stated that the information has previously been provided.
10. On 28 October 2016, the Agency provided the Applicant with a summary of the CARS reports.
11. On 28 October 2016, the Applicant requested that the Agency provide a dated copy of the original notice of decision, which was re-issued by the Agency on 30 October 2016. This is the date of the decision for the purposes of this external review, which was requested by the Applicant on 25 November 2015.
12. In his request for external review, the Applicant asserts that:
- a. the Agency refused to release information that was requested formally and informally;
 - b. the Agency has disclosed his name, address and signature on its website;
 - c. he seeks an apology, that the Agency change its practice when dealing with the public, and that it provide training for staff in ethical behaviour.
13. The matters at paragraphs 12b and 12c are outside the scope of this review and have been separately addressed in direct correspondence to the Applicant.
14. During the course of this review, on 18 April 2016 the Agency provided further information to the Applicant which had been subject to third party consultation, (items C1550217 and C1562705) and decided to refuse access to Email 9 because of the overriding public interest against disclosure at clause 3(a) of section 14 of the GIPA Act.
15. On 18 April 2016 the Applicant contacted the IPC and reiterated his belief that he has not been provided with all information, in particular:
- a. the letter by the Department of Planning and Environment Southern Regional Manager, Mr Brett Witworth, that confirms that the fence is compliant as stated by the former Acting GM, Mr Hugh Percy, in his report to Council's Ordinary Meeting of 27 May 2015 see below ...
- "Council has been compliant which is confirmed by advice from the GM Southern Region Planning Services"; and*

- b. emails between the Council's General Manager, Mr Tegart and my neighbour.
16. On our construction, the assertion referred to by the Applicant that "*the fence is compliant*" is not supported by the reported statement of Mr Percy, which asserts that "*Council has been compliant.*"
17. In any event, we draw the Applicant's attention to the statement by the Agency on 26 October 2015 that "*No such record was detected*" with respect to "*the document from the GM Southern Region Planning Services that confirms that the fence is compliant.*"

Decisions under review

18. The decisions under review are the Agency's decisions:
- a. to provide access to some of the information on 28 September 2015 (reviewable under section 80(d) of the GIPA Act);
 - b. to refuse access to some information on 28 September 2015 (reviewable under section 80(d) of the GIPA Act);
 - c. to provide access to additional information on 30 September 2015, 26 October 2015, 28 October 2015 and 18 April 2016, (reviewable under section 80(d) of the GIPA Act);
 - d. on 26 October 2015, that some information is not held, (reviewable under section 80(e) of the GIPA Act); and
 - e. to refuse access to some information on 18 April 2016 because of an overriding public interest against its disclosure, (reviewable under section 80(d) of the GIPA Act).
19. Issues arising in this review are:
- a. the scope of the Applicant's request;
 - b. the Agency's issuing an undated notice of decision;
 - c. the manner in which the Agency issued supplementary decisions;
 - d. the manner in which the Agency conducted third party consultation and issued its original decision before consultation was completed;
 - e. failure to exercise the public interest test with respect to information not released because of an overriding public interest against its disclosure;
 - f. inconsistent redactions in some information to which access was provided, (names and contact details of public officers in emails).

Scope of GIPA request

20. The Applicant's GIPA request sought access to information, described in paragraph 5 of this report, as all documents in relation to the 27 Myrtle Crescent Fence Matter, from 12 February 2014 to date.
21. Part of the Applicant's request at paragraph 5(a) is for answers to particular questions, regarding the reasons for certain action being taken by the Agency. We note that one of the Applicant's stated reasons for making his GIPA application is to know how the Agency arrived at its decision nominating him to replace the fence.

22. In its decision in *Davison v NSW Department of Education and Training [2013] NSW ADT 25* at [3] the Tribunal considered what constitutes the terms of an access application for the purposes of the GIPA Act.
23. The GIPA Act provides applicants with the right to seek access to government information held by the Agency at the time the request is made.

It is not a vehicle for seeking answers to questions a person might have in regard to administrative action taken by a government agency, or seeking an explanation by an agency as to why particular action was taken.
24. It is not a mechanism through which responses to questions may be sought unless that explanation is contained in a record of the agency at the time the GIPA access request was made.
25. We note that on page 3, the notice of decision advises that the nature of the GIPA Act is to provide information and that as the Applicant's question is "opinion based", the decision maker is not in a position to provide an opinion.
26. We recommend pursuant to section 95 of the GIPA Act that in dealing with future access requests, the Agency clarify the nature of the request at the time of receipt if necessary and advise the Applicant that an access application under the GIPA Act cannot be used as a mechanism to request answers to questions, or seek clarification of information to which access has been provided.

Issuing an undated notice of decision

27. Section 126 of the GIPA Act sets out the requirements for any notice given by an agency under the GIPA Act. The Agency has failed to comply with the requirement at section 126(1)(b) which provides that an agency:

...must include the date of the decision or other action of the agency with which the notice or notification is concerned.
28. We note that at the Applicant's request, the Agency re-issued a version of its original notice of decision, dated 28 September 2015 on 30 October 2015.
29. We recommend pursuant to section 95 of the GIPA Act that in dealing with future access requests, the Agency ensure that it include the date on any notice or notifications given under the GIPA Act., and ensure that all the requirements of section 126 are satisfied.

Issuing supplementary decisions

30. Section 58(3) of the GIPA Act provides that:

If an agency finds that information or additional information is held by the agency after deciding an access application, the agency can make a further decision that replaces or supplements the original decision, but cannot be required to make a further decision in such a case. The further decision can be made even if the period within which the application is required to be decided has expired.
31. We recognise that it is available to the Agency to make supplementary decisions pursuant to section 58(3) of the GIPA Act. However, we are concerned at the Agency's somewhat fragmented decision-making in circumstances in which the Agency has made what amounts to 4 supplementary decisions in response to a GIPA application.

32. On page 3 of the original notice of decision, the Agency states that “*the sight distance calculations made by Mr Hansen will be advised separately when information received.*” This was subsequently provided to the Applicant in a supplementary decision dated 26 October 2015. We make no recommendations about this decision, nor about the decision made on 30 September 2015 to provide the Applicant with “*the additional report that went to the Council meeting on 27 May 2015.*”
33. The decision dated 30 October 2015 to provide the CARS reports was in response to the Applicant’s request of 9 October 2015, for “*documents leading to the Council’s ordinary meeting of 28 May 2014, for example the CARS.*” The CARS reports provided for the address “27 Myrtle” appear to be outside the scope of the initial access request. This is because CARS no. 53497, while related to an erected fence, is dated 11 February 2014, and the initial request was for information from 12 February 2014. CARS no. 65647 was “*about not having hot water and was an electrical problem not associated with the council.*”
34. We therefore make no recommendation about the supplementary decision dated 30 October 2015, though remind the Agency that it need only search for information within the scope of the Application. We recommend pursuant to section 95 of the GIPA Act, that the Agency consider this guidance this in dealing with future applications.
35. Our recommendations with respect to the Agency’s supplementary decision dated 18 April 2016, regarding information subject to third party consultation, are discussed below.

Third party consultation

36. Section 54 of the GIPA Act requires that an agency must take such steps as are reasonably practicable to consult with a person before providing access to information if it is of a type which requires consultation, such as their personal or business information. While a third party objection is not determinative in itself, it is an important contribution to an Agency’s decision and must be taken into account when an Agency determines whether there is an overriding public interest against disclosure of information.
37. We refer the Agency to the Information Commissioner’s *Guideline 5 – Consultation on public interest considerations under section 54*, which the Agency must have regard to in accordance with section 15(b) of the GIPA Act.
38. The original notice of decision redacted or withheld the information described in the table at paragraph 6 as it was subject to third party consultation. The covering email for the notice of decision stated that the Agency was “*currently processing*” the items subject to third party consultation.
39. There are two issues in relation to the Agency’s third party consultation process: unnecessary consultation with respect to item C1562705 and the Agency’s oversight in following up on the results of third party consultation.
40. With respect to item C1562705, this is a document authored by the General Manager Southern Region Planning Services dated 5 May 2015, which was copied to the Applicant at that time. We therefore query the need for consultation in circumstances in which the information has previously been provided to the Applicant.
41. During the course of this review, the Agency became aware of an oversight with respect to items for which third party consultation had occurred. On 18

April 2016, the Agency issued a supplementary decision to provide access to items C1550217 and C1562705 and decided to refuse access to Email 9 because of the overriding public interest against disclosure at clause 3(a) of section 14 of the GIPA Act.

42. We are not satisfied that the Agency exercised the public interest test as required by section 13 of the GIPA Act with respect to Email 9 and we recommend pursuant to section 93 the Agency reconsider its decision to refuse access, following the guidance set out at paragraphs 63-65 below.
43. The Agency did not provide any decision with respect to outstanding items under consultation, Email 10 and Email 17. We therefore recommend that the Agency make a new decision with respect to these withheld items of information.
44. We also recommend that in dealing with future GIPA applications, the Agency ensures that it administers its applications with respect to any third party consultations in a more organised and timely fashion, to avoid such oversights occurring.

The public interest test

45. 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.
46. 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.
47. 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

48. 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).
49. In its notice of decision, the Agency listed the following public interest consideration in favour of disclosure of the information:

That disclosure could reasonably be expected to inform the public about the operations of Council and, in particular, their policies and practices for dealing with members of the public.
50. We are satisfied this is a relevant consideration in favour of disclosure.
51. Another factor which may be relevant in the circumstances of this application is that the information may be personal information of the Applicant.

52. We recommend pursuant to section 95 of the GIPA Act that the Agency note that there is no limit to the relevant considerations in favour of disclosure which may be taken into account for the purpose of determining whether there is an overriding public interest against disclosure of government information.

Public interest considerations against disclosure

53. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
54. 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.
55. 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.
56. In its initial notice of decision the Agency did not cite any particular public interest considerations against disclosure of the information, though on page 2, it states that: “*to show that they are relevant to the information you asked for, I need to consider whether they could reasonably be expected to have the effect of disclosing personal information.*”
57. This appears to be a reference to the consideration against disclosure from clause 3(a) of the table to section 14 of the GIPA Act, which provides that:
- There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to reveal an individual’s personal information.*
58. We note that the supplementary decision of 18 April 2016 cites clause 3(a) when it states that Email 9 is not released as it contains information that would reveal an individual’s personal information.

Consideration 3(a) – reveal an individual’s personal information

59. Personal information is defined in the GIPA Act as being:
- ...information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion. [Schedule 4(4)(1) GIPA Act]*
60. To “reveal” information is defined as:
- to disclose information that has not already been publicly disclosed (otherwise than by unlawful disclosure). [Schedule 4(4)(1) GIPA Act]*
61. Section 15(b) of the GIPA Act provides that agencies must have regard to any relevant guidelines issued by the Information Commissioner when determining whether there is an overriding public interest against disclosure.
62. The Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act*. This Guideline sets out what is meant by ‘personal information’ in the GIPA Act and

includes (in paragraph 1.2) examples of what should be considered personal information.

63. In order to establish that this consideration applies, the Agency has to:
 - a. identify whether the information is personal information; and
 - b. consider whether the information would be revealed by disclosing it under the GIPA Act.
64. We would expect the notice of decision to do more than state which consideration against disclosure applies, and to actually describe the nature of the information in terms of how it is personal information, and also to contemplate whether the information would be revealed by disclosing it under the GIPA Act.
65. We have had the opportunity to examine Email 9 and are satisfied that it contains personal information and that this is a relevant consideration against disclosure. We are not however satisfied that the Agency has demonstrated how disclosure of the information would have the stated effect.
66. We recommend pursuant to section 95 of the GIPA Act that in dealing with future GIPA applications the Agency refers to the Information Commissioner's Guidelines where relevant, and also notes our comments with respect to consideration 3(a) and the need to establish the requisite elements.

Personal factors of the application

67. An Agency is entitled to take into account the personal factors of an application under section 55 of the GIPA Act, such as:
 - a. the applicant's identity and relationship with any other person;
 - b. the applicant's motives for making the access application; and
 - c. any other factors particular to the applicant.
68. These factors can be considered as factors in favour of providing the Applicant with access to the information.
69. They can also, pursuant to section 55(3) of the GIPA Act, be considered as factors against providing access if (and only to the extent that) they are relevant to whether disclosure could reasonably be expected to have any of the effects referred to in clauses 2-5 of the table to section 14 of the GIPA Act.
70. We recommend pursuant to section 95 of the GIPA Act that in dealing with future GIPA applications in which personal factors are relevant, the Agency ensures that it complies with section 55(3) of the GIPA Act and that it contemplates what weight the personal factors have in balancing the public interest.

Balancing the public interest

71. 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.

72. We recommend that in making a new decision with respect to Emails 9, 10 and 17, the Agency apply the public interest test in accordance with the requirements of the GIPA Act, by carefully assessing and weighing the relevant considerations for and against disclosure, informed by results of the consultation process and relevant personal factors of the application.

Inconsistent redactions

73. Section 74 of the GIPA Act provides that an agency can delete information from a copy of a record to which access is to be provided in response to an access application either because the deleted information is not relevant to the information applied for or because (if the deleted information was applied for) the agency has decided to refuse to provide access to that information.
74. We note that several emails to which access was provided are subject to redaction of contact numbers of public officers in the course of their duties.
75. While we are satisfied that nothing turns on the fact that the Agency has redacted this information, we remind the Agency that pursuant to clause 4(3) of Schedule 4 to the GIPA Act that:

personal information does not include information about an individual (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.

Recommendations

76. The Information Commissioner recommends that:
- a. the Agency make a new decision by way of internal review pursuant to section 93 of the GIPA Act with respect to Emails 9, 10 and 17, and in doing so, note the guidance in this report; and
 - b. in dealing with future GIPA applications, the Agency adopt the guidance in this report at paragraphs 26, 29, 34, 44, 52, 66, 70, 72 and 75, with respect to its general procedures for dealing with GIPA applications, pursuant to section 95 of the GIPA Act.
77. We ask that the Agency advise the Applicant and us **within 10 working days of the date of this report** of the actions to be taken in response to our recommendations.

Review rights

78. 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.
79. The Applicant has the right to ask the NCAT to review the Agency's decision.
80. 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>

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

Completion of this review

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

Elizabeth Tydd
Information Commissioner