

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

Applicant: The Applicant  
Agency: Wingecarribee Shire Council  
Report date: 02 August 2016  
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prejudice effective exercise of agency’s function - reveal  
personal information – contravene an information protection  
principle – reveal false allegations that are defamatory

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## Summary

1. The Applicant on behalf of Anonymous Pty Ltd (the Applicant) represented by Minter Ellison, applied for information from the Wingecarribee Shire Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).
2. The Agency decided to refuse access to information because of an overriding public interest against disclosure.
3. The Information Commissioner concludes that the decision of the Agency is justified pursuant to section 97(1) of the GIPA Act.
4. The Information Commissioner recommends pursuant to section 95 of the GIPA Act, that in dealing with future GIPA applications, the Agency note the guidance in this report, at paragraphs 26, 44-46 and 49.

## Background

5. The Applicant applied under the GIPA Act to the Agency for access to any letter of complaint received by Wingecarribee Shire Council in relation to Land Use Application Number 14/0785 – 26 Seniors Living Units, within the date range 1 January 2016 – 6 May 2016.
6. In its decision issued on 22 June 2016, the Agency decided to refuse access to the information.
7. In seeking a review of the decision by the Information Commissioner, the Applicant maintains that the overriding public interest against disclosure of the information has not been met and that there is a general public interest in favour of the disclosure of the information.

## Decisions under review

8. The decision under review is the Agency's decision to refuse access to information. This is a reviewable decision, pursuant to section 80(d) of the GIPA Act.
9. In undertaking this review, we have had access to the information to which access is denied.

## The public interest test

10. 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.
11. 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.
12. 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.
13. 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**

14. 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).
15. In its notice of decision, the Agency listed the following public interest considerations in favour of disclosure of the information in issue:
- a. disclosure could reasonably be expected to inform the public about the operations of the Agency, and its policies and practices for dealing with members of the public. This is because the Agency's website advises the public that it can be contacted for complaints about noise; and
  - b. disclosure could reasonably be expected to provide procedural fairness, because the complaint alleges non-compliance with conditions of development consent for application 14/0785.
16. We are satisfied these are relevant considerations in favour of disclosure of the information.

### **Public interest considerations against disclosure**

17. The only public interest considerations against disclosure that can be considered are those in schedule 1 and section 14 of the GIPA Act.
18. 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.
19. 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.
20. In its notice of decision the Agency raised four public interest considerations against disclosure of the information, deciding that its release could reasonably be expected to:
- a. prejudice the effective exercise by an agency of the agency's functions (clause 1(f) of the table to section 14 of the GIPA Act);
  - b. reveal an individual's personal information (clause 3(a) of the table to section 14 of the GIPA Act);
  - c. contravene an information protection principle under the Privacy and Personal Information Protection Act 1988 (clause 3(b) of the table to section 14 of the GIPA Act); and

- d. reveal false or unsubstantiated allegations about a person that are defamatory (clause 3(e) of the table to section 14 of the GIPA Act).
21. I will discuss each of these considerations in turn.

### **Consideration 1(f) – prejudice the effective exercise by an agency of the agency's functions**

22. Clause 1(f) of the table at section 14 states:
- There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to prejudice the effective exercise by an agency of the agency's functions.*
23. To show that this is a relevant consideration against disclosure, the agency must establish:
- a. the relevant function of the agency; and
  - b. that is or would be prejudiced by release of the information.
24. The meaning of the word prejudice is to “cause detriment or disadvantage”.
25. The notice of decision submits that in order to effectively exercise its investigative and enforcement function with respect to potential breaches of legislation, the Agency adopts a policy to not release personal details or identifying information of any personal making a complaint. It adds that releasing this personal information may discourage prospective complainants from contacting the Agency in future.
26. We are satisfied that this is a relevant consideration against disclosure of the information. However, we recommend that in future notices of decision in which this consideration is claimed to apply, the Agency provide further detail with respect to the nature of the prejudice to the function in question.

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

27. Clause 3(a) of the table at section 14 as a public interest consideration against disclosure states:
- 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.*
28. 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]*
29. 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.
30. The Information Commissioner has published *Guideline 4 – Personal information as a public interest consideration under the GIPA Act*, which 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.

31. 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.
32. The notice of decision states that the requested information includes personal information of a person other than the Applicant, including names, a personal address and information from which a person's identity can reasonably be ascertained. It also submits that to disclose the information under the GIPA Act would reveal that personal information.
33. Having examined the information, we are satisfied that the Agency has established that this is a relevant consideration against its disclosure.

**Consideration 3(b) – contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998***

34. Clause 3(b) of the table at section 14 states:

*There is a public interest consideration against disclosure if disclosure of the information could reasonably be expected to 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.*
35. If an agency relies on clause 3(b) of the table to section 14 as a consideration against disclosure, it must demonstrate a reasonable expectation that an information protection principle or health privacy principle would be contravened by disclosure of the information.
36. The notice of decision states that to disclose the information would breach the information protection principle relating to disclosure in section 18 of the *Privacy and Personal Information Protection Act 1998*, and that none of the exceptions in sections 18(1)(a), (b) or (c) are met in this case. The Agency also refers to its Access to Information policy, which relevantly provides that the Agency “*will not release the personal details or identifying information of any person making a complaint.*”
37. We are satisfied that the Agency has established this is a relevant consideration against disclosure of the information.

**Consideration 3(e) – reveal false or unsubstantiated allegations**

38. Clause 3(e) of the table at section 14 as a public interest consideration against disclosure states:

*There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to reveal false or unsubstantiated allegations about a person that are defamatory.*
39. To demonstrate that this is a relevant consideration, the Agency must show that the information contains:
  - a. false and unsubstantiated allegations against a person; and
  - b. that those allegations are defamatory.

40. In order to satisfy the second element of this consideration, the Agency must consider and reach a conclusion about whether the allegations are defamatory according to the general principles of defamation law.
41. A general statement of the elements of defamation from Halsbury's Laws of Australia (chapter written by Dr David Rolph) states (with notes removed):

*A publication is defamatory of a person if it tends, in the minds of ordinary reasonable people, to injure his or her reputation either by:*

  - (1) *disparaging him or her;*
  - (2) *causing others to shun or avoid him or her; or*
  - (3) *subjecting him or her to hatred, ridicule or contempt.*

*The cause of action in defamation is complete upon the publication of a defamatory imputation and damage may be inferred without proof of actual loss or injury to the plaintiff.*
42. The notice of decision asserts that clause 3(e) applies because some of the information is unsubstantiated and it contains allegations and comments which have not been investigated or tested, and which are considered potentially defamatory.
43. Having examined the information in question, we are not satisfied that the Agency has demonstrated the necessary elements to justify its decision as to the relevance and significance of this consideration.
44. In order to justify its decision, an Agency needs to do more than assert that a consideration against disclosure applies. The Agency needs to explain how disclosure of the information could reasonably be expected to have the anticipated consequence, in this instance with reference to the potentially defamatory content.
45. It must give reasons, including 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 (section 61(1) and (b) of the GIPA Act.)
46. We recommend pursuant to section 95 of the GIPA Act that in dealing with future GIPA applications the Agency note this guidance.

#### **Deletion of information from copy of record to be accessed – section 74 of the GIPA Act**

47. Section 74 of the GIPA Act helps to mitigate considerations against disclosure, by enabling an agency to delete information from a copy of a record to which access is to be provided.
48. We acknowledge that in the Applicant's request for external review, the Applicant presses for redaction of personal information from a copy of the information to which access is sought. However, it is apparent from our examination of the material that the complaint is drafted in such a way that to do so would not prevent the identity of individuals from being revealed, through constructive identification.
49. The Information Commissioner recommends that in future notices of decision, the Agency demonstrate that it has turned its mind to the possibility of deletion

of information for which there is an overriding public interest against disclosure, in order to facilitate access to requested information.

### **Balancing the public interest**

50. 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.
51. We are satisfied that the Agency undertook appropriate consultation on public interest considerations pursuant to section 54 of the GIPA Act, which have been taken into account in determining whether there is an overriding public interest against disclosure of the information.
52. Notwithstanding our comments about consideration 3(e) not being established as relevant, we are satisfied that in its attribution of weight to the considerations for and against disclosure, the Agency has applied the public interest test in accordance with the requirements of the GIPA Act.

### **Recommendations**

53. The Information Commissioner concludes that the decision of the Agency is justified pursuant to section 97(1) of the GIPA Act.
54. The Information Commissioner recommends pursuant to section 95 of the GIPA Act, that in dealing with future GIPA applications, the Agency note the guidance in this report, at paragraphs 24, 44-46 and 49.

### **Review rights**

55. 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.
56. The Applicant has the right to ask the NCAT to review the Agency's decision.
57. 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>

## **Completion of this review**

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

Elizabeth Tydd  
**Information Commissioner**