

25 August 2020

Review Officer
Upper Hunter Shire Council

By email to: council@upperhunter.nsw.gov.au

Dear Review Officer

On 3 July 2020, Elizabeth Flaherty of scone.com.au (the Applicant) requested an external review by the Information Commissioner of a decision made by the Upper Hunter Shire Council (the Agency) under the *Government Information (Public Access) Act 2009* (GIPA Act).

The Agency decided on 12 August 2020 that some of the information requested was not held, and to refuse to provide access to the information it did hold because there is an overriding public interest against disclosure.

On this basis, the decision under review is a reviewable decision in accordance with section 80(d) of the GIPA Act.

This correspondence sets out my recommendations and some guidance arising from this review. I have also sent a copy of this letter to the Applicant so that she is aware of the outcome of the request for review.

I recommend that the Agency reconsider its decision by way of an internal review. This recommendation is made under section 93 of the GIPA Act. Please note that there is no fee payable for the internal review. **The decision of the internal review cannot be carried out by someone who is less senior than the original decision maker.**

I make this recommendation because the decision does not demonstrate that the public interest test was applied in the way required by the GIPA Act.

I have included some information in this letter about applying the public interest test, which I hope will be helpful to the person who conducts the internal review. I have also enclosed information regarding the conduct of searches response to a GIPA application.

Please be advised that I am satisfied that I have sufficient information to determine this application and for these purposes the review period under section 92A of the GIPA Act commenced on **24 August 2020**. Accordingly, this review has been finalised within the review period as required under the GIPA Act.

The Agency's decision

In its notice of decision, the Agency has not listed any public interest considerations in favour of disclosure of the information in issue. It has therefore not properly applied the public interest test to determine if there is an overriding public interest against disclosure of the information in issue before deciding to refuse to provide access.

The GIPA Act requires agencies to identify and consider relevant public interest considerations in favour of disclosure. This is because conducting the public interest test requires agencies to weigh up and balance the public interest considerations in favour of and against disclosure.

This includes the general public interest in favour of disclosing government information set out in section 12(1) of the GIPA Act, which must always be weighed in the application of the public interest test. The Agency should also take into account any other considerations in favour of disclosure that may be relevant (for examples of some public interest considerations in favour of disclosure, see section 12(2) GIPA Act).

As the Agency has not identified any public interest considerations in favour of disclosure, I am not satisfied that, on balance, the Agency has demonstrated an overriding public interest against disclosure exists.

On this basis, I am not satisfied that the Agency's decision to refuse access to information is justified in this instance.

Further on my review of the notice of decision, it appears the Agency has not provided reasons for its decision which is a requirement under section 61 of the GIPA Act. The Applicant requested:

- 1. Documents outlining what the required components of work council put out to tender for the MR358 Project*
- 2. The successful application documents tendered from the above criteria for the MR358 Project*
- 3. The Geotechnical Engineering Report for the MR358 road project that was returned to Council in June 2020.*

The Agency has merely asserted the public interest considerations against disclosure it deems relevant (Clause 1(e) and 1(h) to the Table in section 14 of the GIPA Act) however it has not evidenced in its decision whether it applied the public interest test to the information within the documents or how it balanced the factors in favour and against disclosure of the information.

In order to justify its reliance on the public interest considerations against disclosure, the Agency must identify the relevant information in each document and apply the public interest test to the actual information. This approach is consistent with the matter of *Taylor v Destination NSW [2018] 195* (Taylor).

The Agency's approach seems to be of a generalised nature and accordingly does not in my view satisfy the requirements of section 61 of the GIPA Act, which is addressed further below. Based on the information before me, it appears the Agency has not reached a decision based on consideration of the specific information contained in documents falling within the scope of the access application.

The Agency is encouraged to have regard to the decision in the matter of *Taylor*. The decision is available at the following link: www.caselaw.nsw.gov.au/decision/5b7f3650e4b06629b6c616ad. Additionally the IPC website includes a summary of the Taylor decision and this can be accessed using the following link: <https://www.ipc.nsw.gov.au/taylor-v-destination-nsw-2020-nswcatad-137>

The notice of decision does not explain the Agency's decision to refuse to provide information in accordance with the relevant provisions of the GIPA Act. Administrative decision making requires that a decision provide reasons which explain the decision made for affected parties. Particular to the GIPA Act, section 14 considerations can only be established as valid where reasons are provided to justify the reliance on the considerations after balancing the public interest and weighing the factors in favour and against disclosure.

The notice of decision does not provide any reasoning for how the information sought by the Applicant could reasonably be expected to 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; or 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).

Accordingly, I am not satisfied that the Agency's decision is justified, and I recommend reconsideration of the decision in accordance with section 93 of the GIPA Act. I also recommend under section 92 that the Agency has regard to the guidance provided in this letter in any reconsideration of its decision and in future notices of decision.

Additional Information to guide the conduct of reconsideration of the decision by the Agency

The public interest test

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.

Before deciding whether to release or withhold information, the Agency must apply the public interest test. 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.

The public interest test requires that the Agency undertake the following steps:

- Step 1** identify the public interest considerations in favour of disclosure;
- Step 2** identify the public interest considerations against disclosure; and

Step 3 decide the weight of the public interest considerations in favour of and against disclosure and where the balance between those interests lies.

These steps are discussed in further detail below.

The Agency must apply the public interest test 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 the Information Commissioner;
- 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.

Step 1 - Public interest considerations in favour of release of the information

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. 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).

Section 12 of the GIPA Act sets out examples of public interest considerations in favour of disclosure, including but not limited to:

- promoting open discussion of public affairs, enhancing government accountability or contributing to positive and informed debate on issues of public importance;
- informing the public about the operations of agencies and their policies and practices for dealing with the public;
- ensuring effective oversight of the expenditure of public funds;
- the information is personal information of the person to whom it is to be disclosed; and
- revealing or substantiating that an agency (or officer of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

The Agency may take into account other public interest considerations in favour of disclosure.

The personal factors of the application may also be relevant considerations in the application of the public interest test (section 55 of the GIPA Act), including:

- 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.

Personal factors of the application, such as the applicant's motives for asking for the information may also be relevant.

Step 2 - Public interest considerations against the release of the information

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).

Conclusive presumptions of an overriding public interest consideration against disclosure

If information falls within the scope of one of the clauses of schedule 1 to the GIPA Act, then it is conclusively presumed that it is not in the public interest to release this information. This means that when an agency demonstrates that information is of a kind listed under any of the clauses of Schedule 1 to the GIPA Act, the agency is not required to balance the public interest considerations for and against disclosure before refusing access to the information.

The Agency did not identify any conclusive presumptions of an overriding public interest consideration against disclosure in its notice of decision.

The conduct of searches responsive to the GIPA application

The Agency's notice of decision does not identify what information is held by the Agency nor does it include a schedule of documents responsive to the parameters of the GIPA application. The information requested by the Applicant is specific and detailed in its request.

In dealing with the review the IPC elicited information from the Agency regarding the conduct of its searches and the information held by the Agency. In its notice of decision the Agency should address these issues.

Further, there is nothing to prevent the Agency from providing information to the Applicant at any time during this process.

Information regarding the conduct of searches is available by the following links.

<https://www.ipc.nsw.gov.au/knowledge-update-reasonable-searches-under-gipa-act>

<https://www.ipc.nsw.gov.au/knowledge-update-reasonable-searches-under-gipa-act>

<https://www.ipc.nsw.gov.au/information-access/information-access-resources-public-sector-agencies/searches-information-under-gipa-act>

Step 3 - Balancing the public interest

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.

In reconsidering the decision, the Agency should in the context of the information requested:

- set out the considerations in favour of disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;
- set out the considerations against disclosure, identify the evidence that affects the weight to be given to each consideration, and give weight to each consideration;
- make a decision about which way the balance lies, in light of the weight in favour and against

If at this stage the Agency 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).

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.

Once all of the above steps have been finalised, the Agency should explain its reasons for the decision to the applicant. If the Agency 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.

To assist Agency in drafting notices of decisions, I have included some additional guidance, below.

Notices of decisions

When making a decision about an access application, an agency must issue a notice of decision that meets the requirements prescribed by section 126 of the GIPA Act:

- it must be in writing;
- it must include the date of the decision;
- it must include a statement of the review rights attached to the agency's decision, including details of the time period within which the review rights must be exercised;
- it must include the contact details of an officer to whom inquiries about the decision can be directed; and
- it must not disclose information for which there is an overriding public interest against disclosure.

The Agency, having applied the public interest test under section 13 of the GIPA Act, must include detailed reasons if it decides not to release information in response to a formal access application.

Section 61 of the GIPA Act provides that when an agency refuses to provide access to information because there is an overriding public interest against disclosure, its notice of decision must include the following:

- the reasons for its decision to refuse access;
- the findings on any key questions of fact, and the source of the information on which the findings are based; and
- the general nature and format of the records that contain the information sought.

As good practice a notice of decision for formal applications should include:

- details of the searches conducted by the agency to locate the information asked for;
- the reasons for the agency's decision to withhold the information including:
 - public interest considerations in favour of disclosure and why the agency considers them relevant to the information sought;
 - public interest considerations against disclosure and why the agency considers them relevant to the information sought; and
 - the agency's decision after balancing the public interest considerations for and against disclosure;
- details of relevant consultations as required under section 54 of the GIPA Act;
- details of any personal factors of the application under section 55 of the GIPA Act that the agency has taken into account in making its decision;
- details about the access period (under section 77 of the GIPA Act) and forms of access to any information released under the agency's notice of decision;
- details about whether any processing charges will be payable for access to the information and how those charges have been calculated (as required by section 62 of the GIPA Act);
- whether the agency will record details about the access application in its disclosure log (as required by sections 25 and 26 of the GIPA Act); and
- where relevant, a schedule of documents itemising the documents falling within the scope of the access application, including a description of the record, location of the record within the agency, format of the record, public interest considerations in favour of, or against disclosure, the corresponding GIPA Act sections for any such considerations, and whether the information was released.

Review rights

These 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 NSW Civil and Administrative Tribunal (NCAT) for a review of that decision.

This means that if the Applicant is dissatisfied with my recommendation, or with the Agency's response to my recommendation, then he may ask the NCAT to review the original decision.

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

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

NSW Civil and Administrative Tribunal
Level 10, 86 Goulburn Street,
Sydney, NSW, 2000
Phone: (02) 9377 5711
Facsimile: (02) 9377 5723
Website: <http://www.ncat.nsw.gov.au>

If the Agency makes a new reviewable decision as a result of this 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.

The Agency is requested to notify the Applicant and the IPC within 10 days of this correspondence if it intends to make a new decision.

Completion of this review

This review is now complete.

I trust that the information in this letter is helpful to you in any reconsideration of the decision. If you have any questions about this letter, please contact me on 1800 472 679 or by email to ipcinfo@ipc.nsw.gov.au.

Yours sincerely

Philip Tran
Senior Regulatory Officer