



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Wavelength Group Pty Ltd v Upper Hunter Shire Council [2021] NSWCATAD 182
Hearing dates:	17 June 2021
Date of orders:	30 June 2021
Decision date:	30 June 2021
Jurisdiction:	Administrative and Equal Opportunity Division
Before:	S Goodman SC, Senior Member
Decision:	(1) the decision under review is set aside; (2) the applicant is to be provided with access to the geotechnical report the subject of these Reasons, within 28 days of the date of these Reasons.
Catchwords:	ADMINISTRATIVE LAW – access to government information – access application – public interest considerations in favour of disclosure – public interest considerations against disclosure– whether overriding public interest against disclosure
Legislation Cited:	Administrative Decisions Review Act 1997 Civil and Administrative Tribunal Act 2013 Government Information (Public Access) Act 2009
Cases Cited:	Commissioner of Police NSW Police Force v Camilleri [2012] NSWADTAP 19 Commissioner of Police v Danis [2017] NSWCATAP 7 Fire Brigade Employees' Union v Fire and Rescue (NSW) [2014] NSWCATAD 113 Flack v Commissioner of Police, New South Wales Police [2011] NSWADT 286 Forbidden Foods Pty Ltd v Rice Marketing Board of New South Wales [2020] NSWCATAD 18 Hurst v Wagga Wagga City Council [2011] NSWADT 307 Luxford v Department of Education and Communities (NSW) [2016] NSWCATAD 118

Macquarie University v Howell (No 2) [2009] NSWADTAP 19

McMillan v Commissioner of Police, NSW Police Force;
Brady v Commissioner of Police, NSW Police Force [2013] NSWADT 53

Meacham v Commissioner of Police [2020] NSWCATAP 107

Miskelly v Transport for NSW [2017] NSWCATAD 207

Murphy v Broken Hill City Council [2015] NSWCATAD 135
Newcastle City Council v Newcastle East Residents Action Group [2018] NSWCATAP 254

Re Waterford and Department of the Treasury (No 2) (1984) 5 ALD 588

Taylor v Office of Destination NSW [2018] NSWCATAD 195

Transport for NSW v Searle [2018] NSWCATAP 93

University of New South Wales v McGuirk [2006] NSWSC 1362

Texts Cited:

Nil

Category:

Principal judgment

Parties:

Wavelength Group Pty Ltd (Applicant)
Upper Hunter Shire Council (Respondent)

Representation:

Solicitors:
J Preston (Agent) (Applicant)
Local Government Legal (Respondent)

File Number(s):

2021/00002526

Publication restriction:

Pursuant to s 64 of the Civil and Administrative Tribunal Act 2013, the publication or disclosure of the parts of these Reasons marked "NOT FOR PUBLICATION", other than to the respondent and its legal representatives is prohibited.

REASONS FOR DECISION

Introduction

- 1 Main Road 358 ("MR358"), also known as Coulson Creek Road, connects Merriwa and Willow Tree in the upper reaches of the Hunter Valley.
- 2 Following an upgrade of MR358 by staff of the respondent, principally in 2019, part of MR358 became unusable and was closed to traffic. The respondent commenced an investigation, during which the respondent commissioned and received a geotechnical engineering report ("Report"). The Office of Local Government ("OLG") commenced its own investigation, pursuant to s 430 of the Local Government Act 1993 ("LG Act").

- 3 On 3 July 2020, the applicant lodged an access application under the *Government Information (Public Access) Act 2009* (“GIPA Act”) with the respondent. Relevantly, the applicant sought access to the Report.
- 4 On 12 August 2020, the respondent provided to the applicant the respondent’s notice of decision on the access application and in doing so notified the applicant that the respondent refused to provide access to the Report on the basis that there was an overriding public interest against its disclosure.
- 5 Following a review by the Information and Privacy Commissioner, which recommended that the respondent undertake an internal review of its 3 July 2020 decision, the respondent undertook such a review and on 7 October 2020 provided to the applicant notice of its decision on the internal review (“Notice of Decision”). The respondent’s decision with respect to the Report was unchanged.
- 6 On 4 January 2021, the applicant filed an application in the Tribunal for a review of the respondent’s decision not to provide access to the Report. For the reasons set out below that application is successful and the Report should be released to the applicant.

Jurisdiction and the Tribunal’s task

Jurisdiction

- 7 The respondent’s decision to refuse to provide access to the Report in response to an access application is a decision which is reviewable by the Tribunal: s 80(d) of the GIPA Act. The Tribunal’s jurisdiction to conduct this review derives from s 100 of the GIPA Act, read with s 28 of the *Civil and Administrative Tribunal Act 2013* and s 9 of the *Administrative Decisions Review Act 1997*.

The Tribunal’s task

- 8 The Tribunal’s task, briefly stated, is to decide what the correct and preferable decision is as to whether access to the Report should be provided, having regard to the material before it and any applicable written or unwritten law. The Tribunal re-makes the decision, as if it were the administrator: s 63 of the ADR Act; *Commissioner of Police v Danis* [2017] NSWCATAP 7 at [31].
- 9 In so doing, the Tribunal is to ensure that it does not disclose any information for which there is an overriding public interest against disclosure; or in respect of information which the respondent has claimed there is such an overriding interest but for which the Tribunal finds there is not: s 107 of the GIPA Act; *University of New South Wales v McGuirk* [2006] NSWSC 1362 at [91]. To that end, the Tribunal made an order during the hearing restricting publication or disclosure of the Report. Parts of these Reasons marked “NOT FOR PUBLICATION” are not to be published or otherwise disclosed to any person other than the respondent and its legal representatives.

Material before the Tribunal

- 10 The material before the Tribunal is:
- (1) an affidavit of Ms Amber Maloney, Manager Governance and Risk of the respondent, together with her oral evidence;
 - (2) the internal review decision dated 7 October 2020;
 - (3) written and oral submissions on behalf of the applicant and the respondent; and
 - (4) the Report.

The applicable law

- 11 The applicable law includes the GIPA Act and legal principles applying to the provisions of that Act. Interpretation of the GIPA Act is governed by s 3 of that Act which provides:

3 Object of Act

(1) In order to maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective, the object of this Act is to open government information to the public by:

(a) authorising and encouraging the proactive public release of government information by agencies, and

(b) giving members of the public an enforceable right to access government information, and

(c) providing that access to government information is restricted only when there is an overriding public interest against disclosure.

(2) It is the intention of Parliament:

(a) that this Act be interpreted and applied so as to further the object of this Act, and

(b) that the discretions conferred by this Act be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information.

- 12 Section 9 (1) of the GIPA Act provides:

9 Access applications

(1) A person who makes an access application for government information has a legally enforceable right to be provided with access to the information in accordance with Part 4 (Access applications) unless there is an overriding public interest against disclosure of the information.

- 13 The respondent bears the onus of establishing that its decision is justified: s 105 GIPA Act. That means the respondent must, *first*, identify the information contained in the Report which it contends should be withheld from the applicant because the public interest considerations against disclosure of the information contained in the Report outweigh those in favour; and *secondly* justify its decision through submissions and evidence, sufficient to satisfy the Tribunal: *Taylor v Office of Destination NSW* [2018] NSWCATAD 195 at [20]; *Forbidden Foods Pty Ltd v Rice Marketing Board of New South Wales* [2020] NSWCATAD 18 at [52].

In considering whether there is an overriding public interest against disclosure of particular information, the following sections of the GIPA Act (together with ss 3, 9 and 105) are germane in this proceeding:

5 Presumption in favour of disclosure of government information

There is a presumption in favour of the disclosure of government information unless there is an overriding public interest against disclosure.

...

12 Public interest considerations in favour of disclosure

- (1) There is a general public interest in favour of the disclosure of government information.
- (2) Nothing in this Act limits any other public interest considerations in favour of the disclosure of government information that may be taken into account for the purpose of determining whether there is an overriding public interest against disclosure of government information.

Note: The following are examples of public interest considerations in favour of disclosure of information:

- (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) Disclosure of the information could reasonably be expected to inform the public about the operations of agencies and, in particular, their policies and practices for dealing with members of the public.
 - (c) Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.
 - (d) The information is personal information of the person to whom it is to be disclosed.
 - (e) Disclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.
- (3) The Information Commissioner can issue guidelines about public interest considerations in favour of the disclosure of government information, for the assistance of agencies.

...

13 Public interest test

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.

...

14 Public interest considerations against disclosure

- (1) It is to be conclusively presumed that there is an overriding public interest against disclosure of any of the government information described in Schedule 1.
- (2) The public interest considerations listed in the Table to this section are the only other considerations that may be taken into account under this Act as public interest considerations against disclosure for the purpose of determining whether there is an overriding public interest against disclosure of government information.

...

Table

1 Responsible and effective government

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 (whether in a particular case or generally):

...

(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

(f) prejudice the effective exercise by an agency of the agency's functions,

...

(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).

...

3 Individual rights, judicial processes and natural justice

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:

...

(d) ... prejudice the fair trial of any person, the impartial adjudication of any case or a person's right to procedural fairness

...

4 Business interests of agencies and other persons

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:

...

(d) prejudice any person's legitimate business, commercial, professional or financial interests,

(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)

15 Principles that apply to public interest determination

A determination as to whether there is an overriding public interest against disclosure of government information is to be made in accordance with the following principles:

(a) Agencies must exercise their functions so as to promote the object of this Act.

(b) Agencies must have regard to any relevant guidelines issued by the Information Commissioner.

(c) The fact that disclosure of information might cause embarrassment to, or a loss of confidence in, the Government is irrelevant and must not be taken into account.

(d) The fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account.

(e) In the case of disclosure in response to an access application, it is relevant to consider that disclosure cannot be made subject to any conditions on the use or disclosure of information.

55 Consideration of personal factors of application

(1) In determining whether there is an overriding public interest against disclosure of information in response to an access application, an agency is entitled to take the following factors (the personal factors of the application) into account as provided by this section:

- (a) the applicant's identity and relationship with any other person,
- (b) the applicant's motives for making the access application,
- (c) any other factors particular to the applicant.

(2) The personal factors of the application can also be taken into account as factors in favour of providing the applicant with access to the information.

(3) The personal factors of the application can be taken into account as factors against providing access 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 clause 1, 6 or 7) of the Table to section 14.

15 As the above provisions demonstrate, the GIPA Act creates a presumption in favour of disclosure of government information unless there is an overriding public interest against disclosure of that information (s 5 GIPA Act), and the applicant has a legally enforceable right to the government information it seeks, subject (again) to there not being an overriding public interest against disclosure (s 9 GIPA Act).

16 There will be an overriding public interest against disclosure for the purposes of the GIPA Act *if and only if* there are public interest considerations against disclosure which outweigh the public interest considerations in favour for disclosure (s 13 GIPA Act).

17 In the present case, the only considerations against disclosure are contained in the Table in s 14 of the GIPA Act. As such, the Tribunal's task is to consider and weigh in the balance:

- (1) the public interest considerations *in favour of* disclosure, which are unlimited and include:
 - (a) the general public interest in favour of disclosure (s 12(1) GIPA Act);
 - (b) the examples listed in the note to s 12(2) of the GIPA Act; and
- (2) the public interest considerations *against* disclosure, which are limited to those in the table in s 14 of the GIPA Act.

18 In undertaking this balancing task the Tribunal is entitled to take into account the "personal factors of the application" as factors *in favour of* disclosure (s 55 GIPA Act). The personal factors of the application are described in s 55 as:

- (1) the applicant's identity and relationship with any other person;
- (2) the applicant's motives for making the access application; and
- (3) any other factors particular to the applicant.

19 The Tribunal is also entitled to take into account personal factors of the application as factors *against* disclosure, but only to the extent that those factors are relevant to the consideration of whether disclosure of the Report could reasonably be expected to have any of the effects referred to in cll 2, 3, 4 or 5 of the table in s 14 of the GIPA Act.

20

In the present case, the respondent does not rely upon cll 2 or 5 of the table in s 14 of the GIPA Act, but does rely upon cll 3(d) and 4(d) and (e). Thus, the personal factors of the application may be taken into account as factors *against* disclosure of the Report when considering whether disclosure of the Report could reasonably be expected to have the effect described in cll 3(d) or 4(d) or (e).

- 21 The balancing exercise requires the Tribunal to make a broad value judgment. However, that judgment is to be made, not in a vacuum, but instead in a context which has regard to the objects of the legislation, the general presumption in favour of disclosure of government information, and the principles set out in s 15 of the GIPA Act: see *Transport for NSW v Searle* [2018] NSWCATAP 93 at [104].

Public interest considerations in favour of disclosure

- 22 There is a general public interest in favour of the disclosure of government information: s 12(1) of the GIPA Act. The parties are agreed that the following public interest considerations found in the note to s 12(2) of the GIPA Act are also public interest considerations in favour of disclosure of the Report:

- (1) disclosure of the Report could reasonably be expected to promote open discussion at public affairs, enhance government accountability or contribute to informed debate on issues of public importance;
- (2) disclosure of the Report could reasonably be expected to inform the public about the operations of the respondent;
- (3) disclosure of the Report could reasonably be expected to ensure effective oversight of the expenditure of public funds; and
- (4) disclosure of the Report could reasonably be expected to reveal or substantiate that the respondent (or a member of the respondent) has engaged in misconduct or negligent, improper or unlawful conduct (and in particular negligent or improper conduct).

- 23 The applicant also contends that there are other public interest considerations in favour of disclosure of the Report, namely the public interest in the safety of users of MR358 and the availability of MR358 for use. In response, the respondent submitted that the question of safety had been addressed by the closing of the road and the commencement of an investigation. The Tribunal's view is that the respondent's submission does not gainsay the applicant's submission. In particular, the further considerations suggested by the applicant are not limited in time to the past problems with MR358 and may be relevant to the future use of MR358 and indeed other roads within the respondent's area of governance.

- 24 Thus, the public interest considerations in favour of disclosure are:

- (1) the general public interest in favour of disclosure of government information;
- (2) disclosure of the Report could reasonably be expected to promote open discussion at public affairs, enhance government accountability or contribute to informed debate on issues of public importance;
- (3) disclosure of the Report could reasonably be expected to inform the public about the operations of the respondent;
- (4) disclosure of the Report could reasonably be expected to ensure effective oversight of the expenditure of public funds;
- (5) disclosure of the Report could reasonably be expected to reveal or substantiate that the respondent (or a member of the respondent) has engaged in misconduct or negligent, improper or unlawful conduct (and in particular negligent or improper conduct);
- (6) the public interest in the safety of road users; and
- (7) the public interest in roads being available for use.

Public interest considerations against disclosure

- 25 As noted above, the only public interest considerations against disclosure which arise for consideration in this proceeding are those listed in the table in s 14 of the GIPA Act.
- 26 The clauses in the table upon which the respondent relies are cl 1(e), (f), (h), 3(d), 4(d) and 4(e).

Could reasonably be expected

- 27 Each of these public interest considerations against disclosure includes in its chapeau the phrase "... *could reasonably be expected to have one or more of the following effects ...*". The principles to be applied in considering whether disclosure of information "*could reasonably be expected*" to have a particular effect were summarised by an Appeal Panel in *Transport for NSW v Searle* [2018] NSWCATAP 93 at [68] as follows:

"68. There was no dispute between the parties that:

...

(2) The words "could reasonably be expected" are to be given their ordinary meaning. They require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that disclosure would have the relevant effect: *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190.5; *Raven v The University of Sydney* [2015] NSWCATAD 104 at 48. As was made clear by Hayne J in *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 at [61] –

... when their Honours said, as they did, that the words required a "judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous," to expect certain consequences, they are not to be understood as having used the latter expression as a paraphrase of the

former. Rather, they are to be understood, and have since been understood, as doing no more than drawing an emphatic comparison. To do more would have been, as their Honours correctly said, "to place an unwarranted gloss upon the relatively plain words of the Act."

(3) In order to discharge the onus, the appellant needed to show more than a mere possibility, risk or chance of prejudice. It must be based on real and substantial grounds: *Australian Vaccination Network v Department of Finance & Services* [2013] NSWADT 60 at [22].

(4) It will not be sufficient for the decision-maker to proffer the view. It must be supported in some way: *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 573G; *Raven* at [53].

(5) "Prejudice" is to be given its ordinary meaning, that is, to cause detriment or disadvantage, or to impede or derogate from: *Hurst v Wagga Wagga City Council* [2011] NSWADT 307 at [60].

(6) The question as to prejudice to future supply was not to be determined by reference to the particulars of the instant situation. It was not necessary to show that it could reasonably be expected to occur on every occasion. It was to be determined at a broader operational level. Hence, the fact that in the instant situation the specific individual(s) supplying the information was unlikely to be inhibited even if there was disclosure was not determinative against the agency: *Camilleri* at [21], [22] and [26]."

28 Whether disclosure of particular information "*could reasonably be expected to*" have a particular effect is a question of fact to be established to the relevant standard of proof, on the balance of probabilities: *Flack v Commissioner of Police, New South Wales Police* [2011] NSWADT 286 at [42]; *McMillan v Commissioner of Police, NSW Police Force*; *Brady v Commissioner of Police, NSW Police Force* [2013] NSWADT 53 at [66].

29 The requirements for proof of questions of fact in administrative review proceedings generally were summarised by an Appeal Panel in *Meacham v Commissioner of Police* [2020] NSWCATAP 107 at [54] and [83]:

"[54] Despite not being bound by the rules of evidence, the Tribunal is required to base its findings of fact on "logically probative material", and not on "mere suspicion or speculation", as a corollary of its obligation to act reasonably: *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41 ("*Pochi*") at 62, 68 (Deane J); [1980] FCA 85; *Sullivan v Civil Aviation Authority* (2014) 22 FCR 555; [2014] FCAFC 93 ("*Sullivan*") at [5]-[8], [15]-[17] (Logan J). It is an error of law for the Tribunal to make a finding of fact with no evidence, or no probative evidence, to support it.

...

[83] Proof of matters which are asserted is required in a practical sense, and a party asserting a fact is generally required to provide evidence to substantiate it. As noted above, the Tribunal is required to base its findings of fact on "logically probative material": *Pochi* at 62, 68; *Sullivan* at [5]-[8], [15]-[17]."

30 In *Newcastle City Council v Newcastle East Residents Action Group* [2018] NSWCATAP 254 an Appeal Panel considered the evidence required to establish that disclosure of the information *could reasonably be expected to* have a particular effect. After referring to *Searle* and the authorities discussed in that decision, the Appeal Panel said at [59]:

"Based on these authorities when considering the evidence on which it is asserted that disclosure "could reasonably be expected" to have a particular effect, the following principles should be kept in mind:

(1) a mere statement that disclosure could reasonably be expected to have a particular effect is insufficient;

- (2) there must be real and substantial grounds supporting an opinion that disclosure could reasonably be expected to have a particular effect;
- (3) prominence should be given to inferences capable of being drawn from established facts, rather than on the subjective views of witnesses.”

Prejudice

- 31 Each of the public interest considerations relied upon by the respondent uses the word “prejudice”. In this regard, “prejudice” bears its ordinary meaning, that is, “to cause detriment or disadvantage” or “to impede or derogate from”: *Hurst v Wagga Wagga City Council* [2011] NSWADT 307 at [60].

The evidence relied upon by the respondent

- 32 The principal evidence relied upon by the respondent in support of its contention that the various public interest considerations against disclosure upon which it relies apply is set out in the affidavit of Ms Maloney. The effect of that evidence is as follows.

- 33 First, following the closure of the section of MR358 “investigations were commenced into the reasons behind the structural failings of the MR358 Project. Part of the internal investigations included geotechnical investigation of the damaged pavement and road formation”.

- 34 Secondly, the OLG decided to undertake an independent investigation under s 430 of the LG Act and that investigation is still being carried out. The terms of reference of the OLG investigation are:

“To investigate and report upon: -

1. The adequacy of decisions made by Council as to its capacity to successfully complete the MR358 Road Upgrade Project within expected or required timeframes;
2. The causes of the road failure and the responsibility of Council officials for relevant acts or omissions;
3. The financial impact upon Council arising from road failure and required rectifications works;
4. The adequacy of Council’s project management frameworks for roadworks;
5. The supervision and performance of staff identified as being responsible for key aspects of the Project;
6. The accuracy and adequacy of reports to Council in respect of the status and progress of the Project;
7. The management of risks associated with any identified departures from engineering/industry standards and/or best practice with respect to the construction of the road and the management of the project; and

Any other matters that may be relevant, particularly in relation to the application process for, and administration of, grant funding for projects such as the MR358 Upgrade.”

- 35 Thirdly, Ms Maloney sets out the following extracts from the Notice of Decision:

“The requested report forms part of ongoing external and internal investigations into the reasons behind the structural failings of the MR358 project. It is essential that Council is able to undertake a complete, unbiased and thorough investigation of this matter to ensure observance of lawful internal and industrial procedures and importantly achieve the best outcomes for the community.

In order to undertake a complete, unbiased and thorough investigation of this matter, the action and decisions of all personnel involved in the project must be investigated in a complete and impartial manner. The information contained in the GA Report June 2020 provides information that informs the investigations.

Premature public release of any information relating to the ongoing investigations could reasonably be expected to prejudice the integrity and impartiality of the investigations, and therefore the impartial review of personnel performance and accountability, particularly considering the strong community interest, opinions and public speculation relating to the investigations, and the fact that the investigations are not yet complete.

Further, public speculation of wrongdoing by a staff member, that has not yet been fully investigated or substantiated, could be reasonably expected to prejudice that person's legitimate professional interest and reputation, regardless of the final findings of the investigation."

...

Council does intend to proactively release information relating to the report and the investigations into MR358, once the investigations are completed and at such time that it is appropriate to do so.

- 36 Fourthly, Ms Maloney noted that the OLG investigation continues and as it terms of reference include reviewing responsibility of Council officials for relevant acts and omissions that may have contributed to the road failure, it is the respondent's view that the release of the Report now would be premature.
- 37 Fifthly, the applicant is associated with a public website (scone.com.au) that publishes local information including information about Council. Ms Maloney believes that as previous information relating to MR358 had been made publicly available on that website it is reasonable to assume that any further information provided to the applicant is likely to also be made publicly available on that website.
- 38 The respondent's evidence also includes the Report which, as noted above, the Tribunal has received on a confidential basis. The respondent has not identified particular information within the Report to which it says that access should not be provided, rather its case has proceeded on the basis that the access should not be provided to the whole Report. The Tribunal has considered the Report in detail.

Clause 1(e)

- 39 Clause 1(e) provides that there is a public interest consideration against disclosure of information if disclosure of that information could reasonably be expected to have the effect (whether in a particular case or generally) of revealing 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.
- 40 The respondent's submissions may be summarised as follows:
- (1) whilst it is incumbent upon the respondent to identify the matters relied upon to demonstrate the relevant considerations, this is a task which is to be undertaken at a "relatively abstract" level of analysis, relying upon *Macquarie University v Howell (No 2)* [2009] NSWADTAP 19 at [10];

- (2) the Notice of Decision includes the passage reproduced in the affidavit of Ms Maloney (set out at paragraph [35] above);
- (3) the terms of reference for the OLG investigation include paragraphs 1, 2, 4 and 5 of terms set out at paragraph [34] above;
- (4) the Report forms part of both the internal respondent investigation and the external OLG investigation and will provide part of the information which underpins findings which may be made as to the decision making, acts or omissions, responsibility or adequacy of management of Council officials which may have contributed to the road failure; and
- (5) the premature release of the information in the Report would prejudice the investigations by revealing advice or recommendations set out in the report prior to the conclusion of the investigations.

41 The applicant's submissions may be summarised as follows:

- (1) it is incumbent upon the respondent to point to a particular deliberation or consultation conducted, or an opinion, advice or recommendation given that would be prejudiced in some way (relying upon *Commissioner of Police NSW Police Force v Camilleri* [2012] NSWADTAP 19 at [37]);
- (2) the respondent has provided no specific evidence supporting its claim; and
- (3) speculation as to the investigative conduct of another agency (the OLG) does not meet the requirement of this clause.

42 The Tribunal accepts that disclosure of the Report may reasonably be expected to have the effect of revealing an opinion, advice or recommendation given to the respondent.

43 However, for cl 1(e) to apply it is necessary to also conclude that it could reasonably be expected that such disclosure would occur in such a way as to prejudice the deliberative processes of the respondent. In this regard:

- (1) the words "in such a way as to" in cl 1(e) require that there be a connection between the revelation of the opinion, advice or recommendation and the "prejudice" to a "deliberative process" of the respondent: *Fire Brigade Employees' Union v Fire and Rescue (NSW)* [2014] NSWCATAD 113 at [57]; *Luxford v Department of Education and Communities (NSW)* [2016] NSWCATAD 118 at [103];
- (2) as noted above, the word "prejudice" bears its ordinary meaning; and
- (3) the expression "deliberative process" involves "the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action... It by no means follows, therefore, that every document on a departmental file will fall into this category...documents disclosing deliberative

processes must... be distinguishable from documents dealing with the purely procedural or administrative processes involved in the functions of an agency”: *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 at [58]-[59], *Fire Brigade Employees' Union v Fire and Rescue (NSW)* at [58] and *Luxford v Department of Education and Communities (NSW)* at [104]. In *Miskelly v Transport for NSW* [2017] NSWCATAD 207 at [72], the Tribunal noted:

The ‘deliberative process’ of an agency has been described as its ‘thinking processes ... including those by which it seeks internal input and discussions as to different courses of action, evaluates the wisdom of them, and the relative benefits and detriments of them: *Cameron v Commissioner of Police (NSW)* [2014] NSWCATAD 13 at 66, or its ‘internal thinking’: *Fire Brigade Union v Fire and Rescue (NSW)* [2014] NSWCATAD 133.

44 There are two deliberative processes referred to in the evidence, being the investigations by the respondent and the OLG. Whilst the applicant invited the Tribunal to find, on the basis of the scantiness of the evidence as to the respondent’s investigation, that there was in fact no such investigation, the Tribunal is satisfied on the evidence (albeit slim) that there is an investigation by the respondent. Ms Maloney’s evidence concerning that investigation was not challenged in cross examination.

45 However, the Tribunal is not satisfied that disclosure of the Report could reasonably be expected to have the effect revealing the opinion, advice or recommendation in such a way as to prejudice either investigation. The link between disclosure of the Report and potential prejudice to either investigation is not established on the evidence. Ms Maloney’s evidence does not rise above the level of assertion.

46 For example, there is no evidence as to the stage that each investigation has reached, the basis of any need to restrict access to the Report until the investigations conclude or, critically, how the ongoing investigations could be expected to be prejudiced by the release of the information in the Report. As noted at paragraphs [13] and [28] – [30] above, it is necessary for an agency such as the respondent to provide logically probative evidence from which the conclusions asserted can be drawn.

47 **[NOT FOR PUBLICATION]**

48 Whilst to some extent, the consideration of whether disclosure could reasonably be expected to have a particular effect requires a relatively abstract level of analysis (as the respondent submitted) that analysis needs some evidentiary foundation. That foundation is absent.

Clause 1(f)

49 Clause 1(f) provides that there is a public interest consideration against disclosure of information if disclosure of that information could reasonably be expected to have the effect (whether in a particular case or generally) of prejudicing the effective exercise by an agency of the agency’s functions.

50 “Function” is defined in Sch 4 to the GIPA Act as including “a power, authority or duty”.
“Exercise” is there defined as including the performance of a duty.

51 The respondent’s submissions may be summarised as follows:

- (1) the respondent has the functions imposed or conferred upon it under ss 21 and 22 of the LG Act and it may do such things as are supplemental or incidental to or consequential upon the exercise of its functions (s 23 of the LG Act);
- (2) the functions relevant to this proceeding are:
 - (a) the Council’s provision of goods or services including the construction of roads;
 - (b) the respondent’s financial management functions which include ensuring that works are appropriately funded, and that appropriate decision making has occurred in utilising its funds and undertaking approved works; and
 - (c) employing and managing staff to ensure that they act appropriately and are treated appropriately and fairly.

52 The respondent also places particular reliance upon the following part of the Notice of Decision:

“The premature public release of any information relating to the ongoing investigations could reasonably be expected to prejudice the integrity and impartiality of the investigations, and therefore the impartial review of personnel performance and accountability, particularly considering the strong community interest, opinions and public speculation relating to the investigations, and the fact that the investigations are not yet complete.”

53 The applicant’s submissions may be summarised as follows:

- (1) the Tribunal’s task in considering the respondent’s functions necessitates consideration of what properly constitutes the agency’s functions, such as those prescribed by the statute, and these may not necessarily be found to extend to the information in question (citing *Murphy v Broken Hill City Council* [2015] NSWCATAD 135 at [17]);
- (2) the Tribunal should conclude that there is no investigation by the respondent; and
- (3) as to the external investigation by the OLG, the respondent was required by s 54 of the GIPA Act to consult with the OLG and the respondent’s failure to do so has the consequence that the respondent is not entitled to rely upon this public consideration against disclosure.

54 The Tribunal is not satisfied that disclosure of the Report could reasonably be expected to have the effect (whether in a particular case or generally) of prejudicing the effective exercise of any of the functions suggested by the respondent. Again, a link between

disclosure and prejudice is not established on the evidence and does not rise above the level of assertion.

55 For example, there is no evidence as to the effect that release of the Report might have upon: the construction of roads, the appropriate funding of the respondent's works, appropriate decision making in utilising the respondent's funds and undertaking approved works, or how staff act or the fair and appropriate treatment of staff.

56 **[NOT FOR PUBLICATION]**

Clause 1(h)

57 Clause 1(h) provides that there is a public interest consideration against disclosure of information if disclosure of that information could reasonably be expected to have the effect (whether in a particular case or generally) of prejudicing 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).

58 The respondent submitted that its submissions concerning cl 1(e) are equally relevant and in particular the premature public release of any information in the Report before the completion of the OLG investigation may prejudice the integrity and impartiality of that investigation and the Council investigation and the impartial review of personnel performance and accountability.

59 The applicant repeated its submissions concerning the respondent not having consulted with the OLG. The applicant also submitted that Ms Maloney is not in a position to speak on behalf of the OLG or to speculate upon considerations that the OLG may or may not hold for or against disclosure of the Report.

60 The Tribunal's reasoning with respect to cl 1(e) is apposite. Again, the evidence does not establish a reasonable expectation that disclosure of the Report could have the effect of prejudicing either the respondent's investigation or the OLG's investigation.

Clause 3(d)

61 Clause 3(d) provides that there is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the fair trial of any person, the impartial adjudication of any case or a person's right to procedural fairness.

62 The respondent submitted that:

- (1) the investigations include the responsibility of Council officials for relevant acts or omissions and the supervision and performance of staff identified as being responsible for key aspects of the MR358 project;

- (2) this would include a review of Council's staff performance and accountability and it is essential that the review occurs in an impartial manner and provides procedural fairness to any Council staff that may be involved. In this regard, the respondent relies upon the statement in the Notice of Decision that:

"Further, public speculation of wrong doing by a staff member, that has not yet been fully investigated or substantiated, could be reasonably expected to prejudice that person's legitimate professional interest and reputation, regardless of the final findings of the investigation."

63 The respondent relies upon the applicant's association with the website scone.com.au as a personal factor of the application. In the present circumstances, this factor may be taken into account as relevant to whether the disclosure of the Report could reasonably be expected to the effect of prejudicing the right of any person to procedural fairness.

64 The applicant submitted that:

- (1) the respondent had advanced little by way of evidence to demonstrate that a fair trial may be prejudiced or the manner in which that prejudice may occur, other than a vague reference to moral turpitude or poor performance; and
- (2) the respondent has not indicated the type of process that could be interfered with other than what appears to be suggested on a speculative basis.

65 The Tribunal is not satisfied that this public interest consideration arises. Whilst it may be accepted that members of the respondent's staff may be subject to performance reviews, there is no evidentiary basis for the conclusion that disclosure of the Report could reasonably be expected to have the effect of prejudicing the rights of any such staff member to procedural fairness.

66 **[NOT FOR PUBLICATION]**

Clause 4(d)

67 Clause 4(d) provides that there is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice any person's legitimate business, commercial, professional or financial interests.

68 The respondent:

- (1) submitted that its staff members have legitimate professional interests and that disclosure of the Report could reasonably be expected to prejudice those legitimate professional interests; and
- (2) referred to the following paragraph in the Notice of Decision:

"Further, public speculation of wrong doing by a staff member, that has not yet been fully investigated or substantiated, could be reasonably expected to prejudice that person's legitimate professional interest and reputation, regardless of the final findings of the investigation."

69

The respondent also relies upon the applicant's association with the website scone.com.au as a personal factor of the application. In the present circumstances, this factor may be taken into account as relevant to whether the disclosure of the Report could reasonably be expected to the effect of prejudicing the legitimate professional interests of any staff member.

70 The applicant submitted that:

- (1) it should be common ground that the purpose of the Report is to identify the deficiencies in a road construction project; and
- (2) performing sub-standard roadworks is not a legitimate commercial interest to be protected and that this should be regarded as a consideration in favour of disclosure not against it.

71 The Tribunal is not satisfied that this public interest consideration arises. Again, the evidentiary foundation is absent. No staff members have been identified, even by title, nor is there evidence of their "legitimate professional interest"

72 **[NOT FOR PUBLICATION]**

Clause 4(e)

73 Clause 4(e) provides that there is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to 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).

74 The respondent's submissions may be summarised as follows:

- (1) the term "research" is not defined in the GIPA Act, however it is defined in the Macquarie Dictionary as "diligent and systematic enquiry or investigation into a subject in order to discover or principles";
- (2) the Report forms part of the ongoing investigations into the reasons behind the structural failings of the MR358 Project; and
- (3) the release of the information in the Report would reveal the results of geotechnical conclusions in relation to the structural failings and factual determinations which would prejudice the conduct, effectiveness or integrity of the investigations.

75 The respondent again relies upon the applicant's association with the website scone.com.au as a personal factor of the application. In the present circumstances, this factor may be taken into account as relevant to whether the disclosure of the Report could reasonably be expected to the effect of prejudicing the conduct, effectiveness or integrity of the investigations.

76

The applicant submitted that:

- (1) this ground is not made out on the evidence; and
- (2) there has not been a satisfactory consultation process as required under s 54 of the GIPA Act.

77 The Tribunal is not satisfied that this public interest consideration arises. Assuming, for present purposes, that the investigations could be considered as “research”, there is no evidentiary foundation for a conclusion that the release of the Report could reasonably be expected to reveal the purpose, conduct or results of either investigation, and even less that such a revelation could reasonably be expected to prejudice the conduct, effectiveness or integrity of such an investigation.

78 **[NOT FOR PUBLICATION]**

Balancing exercise

79 For the reasons set out above, none of the public interest considerations relied upon by the respondent have been made out on the evidence. **As there are no public interest considerations to weigh in the balance, it follows that there cannot be an overriding public interest against disclosure and the applicant should be provided with access to the Report.**

Conclusion and Orders

80 For the reasons set out above, the application is successful and the applicant should be provided with the Report.

81 The Tribunal makes the following orders:

- (1) the decision under review is set aside;
- (2) the applicant is to be provided with access to the geotechnical report the subject of these Reasons, within 28 days of the date of these Reasons.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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