

DETERMINATION

To:	The public
Subject	Publishing Written Returns of Interest
Decision-maker:	Sherree List Privacy and Access to Information Officer
Date:	5 May 2020

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DETERMINATION

1. Summary of information subject to determination

On 26 September 2019 the Information and Privacy Commission NSW (IPC) issued a final and revised Guideline¹ for Local Councils on the disclosure of information contained in the Written Returns disclosing the interest of councillors and designated persons (the Guideline).

In summary, the Guideline provides Councillors and designated persons' of interest (Written Returns) must be made publicly available free of charge on Sutherland Shire Council (Council) website, unless there is an overriding public interest against disclosure of the information contained in them, or to do so would impose unreasonable additional costs on Council.

Where Council decides there is an overriding public interest against the disclosure of some of the information contained in Written Returns in line with section 14 of the GIPA Act, consideration should be given to releasing an edited copy of the Written Returns on Council's website.

I am authorised by the principal officer, for the purposes of section 9(3) of the GIPA Act to decide if there are any public interest consideration against disclosure, which outweigh public interest considerations for disclosure of publishing unedited Written Returns on Councils' website (the web).

Section 105 of the GIPA Act provides that the onus is on the agency to justify its decision. Therefore, in this Determination, I will explain my reasons for my decision and the findings on any important questions of fact underlying those reasons in line with section 61 of the GIPA Act.

Firstly, under section 9(1) of the GIPA Act, the public has an enforceable right to access the information it asks for, unless there is an overriding public interest against its disclosure.

Under section 5 of the GIPA Act, there is a presumption in favour of disclosing government information unless there is an overriding public interest against its disclosure.

To decide whether or not there is an overriding public interest against disclosure of the information by way of publishing unedited Written Returns to Councils' website, I applied the public interest test, which is set out in section 13 of the GIPA Act.

I applied that test by:

- (a) identifying any public interest considerations in favour of disclosure,
- (b) identifying any relevant public interest considerations against disclosure, and
- (c) deciding where the balance between them lies.

I did this in the way required by section 15 of the GIPA Act, which is:

- (a) in a way that promotes the objects of the GIPA Act,
- (b) with regard to any relevant guidelines issued by the Information Commissioner,
- (c) without taking into account the fact that disclosure of information may cause embarrassment to, or a loss of confidence in, the Government (as that fact is irrelevant), and
- (d) without taking into account the fact that disclosure of information might be misinterpreted or misunderstood by any person (as that fact is irrelevant).

2 Public interest considerations in favour of disclosure

Under section 12(1) of the GIPA Act, there is a general public interest in favour of disclosing government information. Section 12(2) of the GIPA Act sets out some examples of other public interest considerations in favour of disclosure. However, I am not limited to those considerations.

I find that the following considerations in favour of publishing an unedited version of the Written Returns on the web are relevant:

- Publishing the information further promotes openness and transparency in local government.
- Publishing the information further provides accountability and further enforces to avoid any conflict of interest of designated persons who exercise decision making functions.
- Publishing the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.
- Publishing the information could reasonably be expected to reveal or substantiate that an agency (or member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.
- Publishing the information further supports the object of the GIPA Act.

3 Public interest considerations against disclosure

When applying the public interest test, the only public interest considerations against disclosure that I can take into account are those set out in the table to section 14 of the GIPA Act. In applying the public interest test, I need to consider whether they could reasonably be expected to have the effect outlined in the table.

Section 14 Table 1 of the GIPA Act provides relevantly:

- (3) 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:
 - (a) Reveal an individual's personal information;

- (f) Expose a person to risk of harm or of serious harassment or serious intimidation.

Firstly, 'Personal information' is defined in clause 4 of Schedule 4:

(1) In this Act, personal information means 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.

'Reveal' is defined in clause 1 of Schedule 4 of the GIPA Act to mean 'to disclose information that has not already been publicly disclosed (otherwise than by unlawful disclosure).'

Based on the above definition, the Written Returns contain personal information which would be revealed if the Written Returns were published on the web unedited. The personal information includes information concerning individual(s) such as names, residential address, investment property address and signature.

In considering whether an individual's personal information has already been publicly disclosed, the Tribunal in *AEF v Northern Sydney Local Health District (No 2) [2012]* relied on the decision in *Richards v Commissioner, Department of Corrective Services [2011] NSWADT 98* at [40]:

It is important to note that the definitions of 'government information', 'personal information' and 'reveal' in the GIPA Act operate on information alone, not, as was the case under the Freedom of Information Act 1989, with respect to documents. The issue for consideration is not whether the document has been publicly disclosed, but whether the information they contain has been publicly disclosed. The effect of s 105(1) is to place the burden of establishing that a decision with respect to an access application is justified, on the agency. In circumstances such as the present, that burden includes establishing that release under the GIPA Act could reasonably be expected to reveal an individual's personal information. Where there is material indicating that the information has already been publicly disclosed, that burden requires the agency to establish that it was not.

Secondly, in considering whether the publishing of personal information on the internet could reasonably be expected to expose a person to serious intimidation or serious harassment the following case law is relevant:

- In *"B" and Brisbane North Regional Health Authority (1994) 1 QAR 279*, the Commissioner analysed the meaning of the phrase *could reasonably be expected to*". In particular, the Commissioner stated that:

"160.The words call for the decision maker.....to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist."

- In *McKinnon v Blacktown City Council [2012] NSWADT 44*, Judicial Member Molony stated:

"42 ... the public interest consideration against disclosure in clause 1 and 3 of the Table requires an objective assessment as to whether the claimed effects could be expected to arise. Ultimately, it is a question of fact as to whether the disclosure of the information in issue could reasonably be expected to have the prescribed effect if

disclosed. That fact being established to the relevant standard of proof, on the balance of probabilities.”

Publishing an unedited version of the Written Returns on the web could reasonably be expected to have this effect.

4 Balancing the public interest test

Publishing unedited Written Returns to the web is a measure that instantly displays the integrity of Councils' decision-making process and allows the scrutiny of potential conflicts of interest that may arise where decision makers have close association that derive, or be perceived to derive, personal or financial benefit.

I have considered the relevant public interest considerations in favour of and against publishing unedited Written Returns to Council's web.

After weighing the public interest considerations I consider some personal information in the Written Returns is required to be redacted prior to publishing on Council's web to protect the privacy of designated persons.

I consider it is in the public interest for the name of the designated person to remain on the published Return as it serves the purpose of disclosing the designated persons who have completed a return for the specified period. Further, the names of designated persons are either already in the public domain, or are freely provided to the public to identify the relevant Council Officers who are responsible for carrying out their duties and functions when dealing with the public.

I consider the public interest considerations against the publishing of personal information such as residential, investment property addresses and signatures on the Written Returns outweigh the public interest for disclosure.

Once personal information is published, it is very hard to remove the information from the internet. The information continues to remain in the public domain and can continue to be accessed by the public via various search engines. There is a potential risk personal information such as signatures can be accessed by phishing and hackers to carry out identity fraud, which could lead to financial theft.

When considering if the publishing of personal information, in regards to residential and investment property addresses on the web could reasonably be expected to have the potential to place an individual, their family or property at a risk, would need to be assessed on each individual case and on its own merits against the public interest considerations for and against disclosing via the web.

In determining the considerations, aspects such as applicant's motive and interest in seeking the information, their relationship with Council and any other factors particular to the applicant, would need to be examined.

While I believe the majority of the public accessing Written Returns (unedited) would be reasonable in their use of the information, there is still the risk of a minority who could misuse this information.

Determination

Council has a duty of care to ensure a designated person's personal information is protected where there is an overriding public interest against disclosure. Publishing a redacted version of the Written Returns by deleting a persons' residential address, investment property address and signature assists in protecting the personal information and ultimately the individual.

Further, by continuing to make unedited Written Returns publicly available for inspection and copying free of charge, subject only to any specific public interest considerations provides a controlled environment where Council can:

- record who has requested the information;
- assess if there are any public interest considerations against disclosure and;
- notify the designated person the unedited Return has been accessed.

Publishing to the web provides information to an unrestricted audience in an uncontrolled environment which cannot be monitored.

While I have identified publishing an edited Return may result in part of it being meaningless, as the information is relied upon to determine a pecuniary interest, I do not believe the public at large will be disadvantaged because access to the full version of the Written Returns will remain available to for inspection on request subject to any overriding public interest considerations against disclosure.

5 Determination

Accordingly, I have determined:

- To facilitate public access of Written Returns via the web by deleting information from the Written Return where there is an overriding public interest against disclosure.
- To publish the forthcoming 2019/2020 Written Returns and Written Returns thereafter in a redacted form on Councils' website;
- To make un-redacted Written Returns publicly available for inspection and copying free of charge, subject to any specific public interest considerations against disclosure.
- Not to publish Written Returns on Council's website in a redacted form *before* 2019/2020 as to do so would bear an unreasonable cost.
- Council will keep a record indicating, in general terms, the nature of the information redacted from the return in accordance with section 6(5) of the GIPA Act.

This determination is not a reviewable decision.

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