



**Report under the
Government Information (Public Access) Act 2009**

Applicant:	Port Stephens Council
Agency:	NSW Department of Trade & Investment, Regional Infrastructure and Services
OIC reference:	IPC12-000101
Date review request received:	5 March 2012
Date of this report:	27 November 2012

Summary of report

1. Tony Wickham on behalf of Port Stephens Council (**Council**) asked us to review NSW Department Trade & Investment, Regional Infrastructure and Services (**the Department**) decision to release information requested under the Government Information Public Access Act 2009 (**GIPA Act**). Council is a third party objector.
2. We have reviewed the notice of internal review decision by the Department. In our view the Department has made a decision available to it.
3. We do not make any recommendations against the Department's decision. Our reasons are discussed in this report.

Background to our review

4. On 2 June 2010 The Herald published an article by Ben Smee titled "*Port Stephens fees spark audit demand*". This article reported that Council own a cleaning business which was charging more than \$3000 a day for the cleaning and maintenance at three caravan parks, which prompted the government to launch an investigation and demand an audit of the Council's books. The article also stated that Council manages these caravan parks but shares part of the income with NSW Land and Property Management Authority and that any profit Council makes must be spent on Crown reserves.

5. The Tomaree Ratepayers & Residents Association Inc. (**TRRA**) is an independent body who represent the interests of the ratepayers and residents in the Port Stephens community. The TRRA does this by monitoring the activities of the Council including decisions about the management of finances, assets and its strategic planning. TRRA became concerned by Ben Smee's article and consequently lodged a GIPA access application with the Department on 21 October 2011 for access to:

Any documents including correspondence relating to the Audit initiated by the NSW Land and Property Management Authority (LPMA) of the management and disposal of funds generated by caravan or holiday parks on Crown Lands operated by Port Stephens Council.

We specifically request access to:

1. The report of the Audit cited above prepared for the LPMA which we understand was referred to council
 2. Any documents covering Council's response to the LPMA or any other State authority on the Audit report; and
 3. Any other associated documents relating to further actions, or views of the LPMA or Crown Lands Office in connection with the Audit.
6. In accordance with section 54 of the GIPA Act the Department consulted with the Council to ascertain whether it objected to the disclosure of the information sought by TRRA and if so on what basis. On the 10 November 2011 the Council advised the Department that it objected to the release of this information in accordance with clause 4(d) of the table at section 14(2) of the GIPA Act.
 7. On the 18 November 2011, the Department decided to release the information, despite the Council's objection, as it considered there was no overriding public interest against disclosure of the information.
 8. The Council sought an internal review of the Department's decision insofar as it requested the Department reconsider its decision to release *some* of the information (pages 15, 16 & 19 of the Deloitte report and associated documents) sought by TRRA. On 21 January 2012 the Department explained in its notice of decision, that it agreed with its original decision to release all the information, notwithstanding Council's objection.

Our review

9. On 5 March 2012 Mr Tony Wickham on behalf of Council asked us to review the internal review decision by the Department to release the information sought by the TRRA.
10. In conducting this review we have:
 - a. examined the Department's GIPA file;
 - b. examined the information provided to us by the Council;
 - c. examined the submission made to us by the TRRA;

- d. examined the original notice of decision dated 18 November 2011 and the internal review notice of decision dated 10 January 2012
 - e. spoken with the parties about the information sought by the TRRA.
11. This report addresses the onus placed on Council to establish there is an overriding public interest against disclosure of particular information to TRRA, in accordance with section 97(2) of the GIPA Act.

The public interest test

12. 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 (section 9(1) of the GIPA Act).

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

14. 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.

15. In *Nature Conservation Council of NSW v Department of Trade and Investment, Regional Infrastructure and Services* [2012] NSWADT 195, Judicial Member Montgomery at paragraph 29 recognised that the test in section 13 of the GIPA Act requires decision makers to:

- (i) identify relevant public interest considerations in favour of disclosure,
- (ii) identify relevant public interest considerations against disclosure,
- (iii) attribute weight to each consideration for and against disclosure, and
- (iv) determine whether the balance of the public interest lies in favour of or against disclosure of the government information.

16. Council must apply the public interest test in accordance with the principles set out under section 15 of the GIPA Act.

Public interest considerations in favour disclosure

17. 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.

18. 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).

19. The Department's notice of the internal review decision does not set out any public interest considerations in favour of disclosure that it identified as relevant to the application made by TRRA. The notice did however state that it agreed with the original decision made by the Department. The original notice of decision included the following public interest considerations in favour of disclosure:
 - a. disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds;
 - b. 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.
20. On the 23 May 2012 we received a submission from the applicant (TRRA). In its submission the TRRA explained to us that it seeks access to the information due to its concerns arising from reports in the media and a detailed analysis it conducted of Council's Annual Financial Statements and its Integrated Strategic Plans. The TRRA also told us that it believes there is an obligation on any public authority to be fully accountable for its management of public assets and finances.
21. We note from both the Department's original notice of decision and the submission made by TRRA that there has been numerous articles in the media regarding Council's management and future management of the caravan parks, for example:
 - *Port Stephens fees spark audit demand*, The Herald, 2 June 2010
 - *Park profits threatened – State move to take over management*, Examiner news, 27 October 2011
 - *Park's profit in limbo*, Examiner news, 3 November 2011
22. Some of these articles detail financial arrangements between Council and state government and explain that once Council has paid 5% of the gross income to Crown Lands and other costs, the remaining funds (said to be \$1.5million) can only be spent on improvements to Crown land for example, in the Port Stephens area. They also state that if the management of these parks moves from Council to state government, the profits could be spent state wide rather than restricted to the Port Stephens area.
23. The TRRA submit:
 - Council is operating with an overall underlying deficit of \$5 million per annum which it seeks to overcome through the sale of property assets and rate increases "12% mooted in the 2011 – 21 Integrated Plan"
 - analysis of Council's 2009/10 and 2010/2011 Annual Financial Statements indicate these Holiday Parks have been in a loss situation over the last 3 years
 - a draft Integrated Strategic Plan for 2012 to 2021 was circulated with Council's Committee agenda papers for its meeting on 10 April 2012 in which it was proposed to inject substantial funding into these businesses to achieve a 50-55% occupancy rate, thought to be required for an acceptable return
 - it questioned the wisdom of a proposed capital expenditures for 2011 – 2013 of \$4 million on these parks, even though the annual financial reports show these businesses to be major loss makers necessitating significant Council subsidy
 - in response to a submission by TRRA on Council's Integrated Plans 2011 – 2021, Council wrote to TRRA in which it stated the five holiday parks it manages contributed

net \$1.9 million to Council's revenue in the last financial year and that this income lessens the impact that might otherwise be borne by ratepayers

- it told Council urgent funding is needed to maintain the extensive bayside and beach Crown reserve and recreation facilities which are at the centre of the areas tourist industry and is frequently used by residents.

24. In light of these media reports and the issues raised by TRRA, we are of the opinion that the following considerations in favour of disclosure also apply:
- a. disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;
 - b. disclosure of the information could reasonably be expected to reveal or substantiate whether an agency or official has engaged in misconduct or negligent, improper or unlawful conduct;
 - c. disclosure of the information could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.
25. We are satisfied that there is a broad public interest in the disclosure of the information sought by TRRA and that the considerations in favour of disclosure in this instance carry considerable weight.
26. When writing its notice of decision in response to an original application or an internal review, the Department should list the considerations that it has taken into account and explain why the considerations identified apply to the information sought.

Public interest considerations against disclosure

27. 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).
28. Before applying a consideration against disclosure to the information, Council must:
- a. identify the information;
 - b. characterise it as information to which a public interest consideration against disclosure applies, and
 - c. demonstrate that disclosure of the information could have the effect deemed not to be in the public interest.

Prejudice any person's legitimate business, commercial, professional or financial interests

29. In its application for internal review Council identified clause 4(d) of the table at section 14(2) of the GIPA Act as a public interest consideration against disclosure of pages 15, 16 and 19 of the Deloitte report and the correspondence between Council and Lands.
30. Council's application also explained that these pages of the Deloitte report are considered "commercial in confidence" and that "until such time as a decision is made in relation to the future management of the parks" it would be inappropriate to release the correspondence. It did not state which interests or how they would be prejudiced.
31. Clause 4(d) of the table at section 14(2) of the GIPA Act provides 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
32. The Department considered that clause 4(d) of the GIPA Act was not relevant as the Holiday Parks were not on the 'open market'.
33. If any of the elements of a public interest consideration against disclosure are not met, the consideration does not apply. A public interest consideration against disclosure only applies to information if it meets all of the elements of the consideration.
34. Person is defined in schedule 4 of the GIPA Act: "includes an agency, the government of another jurisdiction including a jurisdiction outside Australia and an agency of the government of another jurisdiction" but does not exclude the *Interpretation Act 1987* (NSW) definition of "person" which includes corporations and other judicial "persons" (s21).
35. Government agencies often receive detailed information about business operations that, if disclosed to a competitor, could undermine that business. The purpose of this clause is to protect those legitimate interests.
36. We consider the relevant meaning of "legitimate" for the purposes of this consideration is its ordinary meaning, that is "genuine, not spurious" (Macquaire Australian Encyclopedic Dictionary, 2006).
37. We asked Council to explain to us:
 - which legitimate interest would be affected?
 - how would this interest be prejudiced if the information was disclosed?
38. Council told us:
 - Port Stephens Council operates its holiday parks in a highly competitive and price sensitive market place.

- The report the subject of the review application contains various commercial, financial and statistical details which if released may benefit competitors and prejudice the commercial operations of these parks.
39. We reviewed the information contained in pages 15, 16 and 19 of the Deloitte report and the associated documents. We are satisfied that the information contained in these pages and the associated documents can be described as financial information and that some of the information may have a commercial value.
 40. However, Council did not explain how disclosure could reasonably be expected to prejudice these interests.
 41. The phrase “could reasonably be expected to” means more than a mere possibility, risk or a chance and must be based on real and substantial grounds and must not be purely speculative, fanciful, imaginary or contrived.¹
 42. The word “prejudice” has been considered and it has its ordinary meaning: “to cause detriment or disadvantage.”²
 43. We cannot see how the disclosure of pages 15, 16 and 19 of the Deloitte report and associated documents provided to the Department “could reasonably be expected” to prejudice its financial or commercial interests. Much of the information is high level and does not show aggregated sources that contribute to a total figure.
 44. We are not persuaded that the prejudice element of this consideration applies. If it does, we are not satisfied that this public interest consideration against disclosure carries any more than marginal weight.

Balancing the public interest

45. The GIPA Act does not provide a set formula for:
 - a. working out the weight of public interest considerations for or against disclosure, or
 - b. deciding if one set of considerations outweighs the other.
46. Whatever approach is taken, this is a questions of fact and degree to which different answers may be given without being wrong (as long as the decision maker acts in good faith and makes a decision available to them under the GIPA Act).
47. We are of the opinion that the decision made by the Department was available to it to make. We are not persuaded that Council has established that there is an overriding public interest against disclosure of pages 15, 16 and 19 of the Deloitte report and associated documents, in accordance with section 97(2) of the GIPA Act.

¹ see for example *Leech v Sydney Water Corporation* [2010] NSWADT 298; *McKinnon v Blacktown City Council* [2012] NSWADT 44 at paragraphs 40 to 44, and *Flack v Commissioner of the Police, NSW Police Force* [2011] NSWADT 286 at paragraphs 41 and 42

² *Hurst v Wagga Wagga City Council* [2011] NSWADT 307 [at 60]

48. We do not make any recommendations in this matter.

Review rights

49. 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 Administrative Decisions Tribunal (**ADT**) for a review of that decision.

50. If Council is dissatisfied with the outcome of our review then it may ask the ADT to review the Department's decision.

51. An application for ADT review can be made up to 20 working days from the date of this report. After this date, the ADT can only review the decision if it agrees to extend this deadline. The ADT's contact details are:

Administrative Decisions Tribunal
Level 10, 86 Goulburn Street,
Sydney, NSW, 2000

Telephone(02) 9377 5711

Facsimile (02) 9377 5723

TTY (02) 9377 5859

Internet <http://www.lawlink.nsw.gov.au/adt>

e-mail ag_adt@agd.nsw.gov.au

Closing our file

52. This file is now closed.

53. If you have any questions about this report please contact Simone Newton on 02 8071 7015 or via email at simone.newton@oic.nsw.gov.au



Simone Newton

Review and Investigation Officer

Level 11, 1 Castlereagh Street, Sydney NSW 2000 • GPO Box 7011, Sydney NSW 2001
t 1800 INFOCOM (1800 463 626) • f 02 8114 3756 • e oicinfo@oic.nsw.gov.au

www.oic.nsw.gov.au