

To	The Public
Subject	Publishing Returns of Councillors and Designated Persons
Decision-maker	Data & Information Management Coordinator
Date of Decision	12 July 2023

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1. Summary of information subject to determination

The review of the Local Government Act removed Section 449 Returns of Councillors and Designated Persons from the oversight of the Office of Local Government and into the purview of the Information and Privacy Commissioner NSW (IPC). The OLG Model Code of Conduct at part 4 requires that *'Information contained in returns made and lodged under clause 4.21 (of the code) is to be made publicly available in accordance with the requirements of the Government Information (Public Access) Act 2009, the Government Information (Public Access) Regulation 2009 and any guidelines issued by the Information Commissioner.'*

Additional to this part the Government Information (Public Access) Act (GIPA Act) sets out the requirement for councils to have regard to any relevant Guidelines issued by the Information Commissioner.

The Information and Privacy Commission reviewed and revised Guideline 1 – For Local Councils on the disclosure of Information (returns disclosing the interest of councillors and designated persons) in September 2019 (the Guideline).

In summary, the Guideline provides Councillors and Designated Persons returns must be made publicly available free of charge on a website managed by Wollondilly Shire Council (the web) 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 Returns in line with section 14 of the GIPA Act consideration should be given to releasing an edited version of the Returns on the web.

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 considerations against disclosure, which outweigh public interest considerations for disclosure and publishing unedited Returns on the web.

The GIPA Act at section 105 provides the onus on council to justify its decision. 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.

I also have to consider section 9(1) of the GIPA Act, which says 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 Returns to the web, I applied the public interest test which is set out in section 13 of the GIPA Act.

I applied this 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 considering 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 considering 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 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 any 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 consider 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

Personal information is defined in the GIPA Act in Clause 4 of Schedule 4 as:

"(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."

Clause 1 of Schedule 4 defines:

‘Reveal information’ – means to disclose information that has not already been disclosed (otherwise than by unlawful disclosure).

Based on the above definitions, the Returns contain personal information which would be revealed if they were published on the web unedited. The personal information includes but is not limited to names, residential address & 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 s105(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.

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] NSW ADT 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 Returns on the web could reasonably be expected to have this effect.

4. Balancing the public interest test

Publishing unedited 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 Returns to the web.

After weighing the public interest considerations, it is my opinion some personal information in the Returns is required to be redacted prior to publishing on council's web to protect the privacy of designated persons.

When balancing the public interest test I also considered Clause 4 of Schedule 4:

- “(3) Personal information does not include any of the following:*
- (b) information about an individual (comprising the individual's name and non-personal contact details, including the individual's position title, public functions and the agency in which the individual works) that reveals nothing more than the fact that the person was engaged in the exercise of public functions.”*

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.

I consider the public interest considerations against the publishing of personal information such as residential address and signatures on the 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 property addresses on the web could reasonably be expected to have the potential to place an individual, their family or property at risk, it would need to be assessed on each individual case and on its own merits against the public interest considerations for and against disclosure via the web.

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

It is held the majority of the public accessing Returns would be reasonable in their use of the information, however there is still the risk of the minority who could misuse this information.

Council's duty of care is to ensure personal information is protected where there is an overriding public interest against disclosure. Publishing a redacted version of the Returns by deleting a person's residential address and signature assists in protecting the personal information and ultimately the individual and by extension their families.

In making unedited Returns publicly available for inspection and copying free of charge on request, subject only to any specific public interest consideration, 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 that 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 Returns will remain available for inspection on request subject to any overriding public interest considerations against disclosure.

5. Determination

I have determined to:

- Facilitate public access of Returns of Designated Persons via the web by deleting information from the Returns where there is an overriding public interest against disclosure.
- Publish Returns in a redacted form on Council's website.
- Make un-redacted Returns publicly available for inspection and copying free of charge, subject to any specific public interest considerations against disclosure.
- Not publish Returns on Council's website in a redacted form before *2019/2020* as to do otherwise would bear an unreasonable cost on Council.
- 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 is not a reviewable decision.