

Disclosure of Interest Returns on Website

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1. Summary of Issue

Whether to provide access via the Bayside Council website to the disclosure of interest returns lodged by Council Officials.

2. Background

Section 440 of the Local Government Act ("LGA") requires every council to adopt a code of conduct that incorporates the provisions of the Model Code of Conduct for Local Councils in NSW 2018 ("Model Code"). Part 4 of the Model Code requires a councillor or a designated person to complete and lodge with the general manager a return disclosing his or her pecuniary interests ("the Returns"). Those Returns contain personal information about each councillor and designated person, including his or her name, address and signature, as well as information about property and share holdings, gifts received, debts owed, other sources of income, and positions held in a trade union or business or professional organisation. The form of the return is set out in Schedule 2 of the Model Code.

The mandatory proactive release provisions of the Government Information (Public Access) Act ("GIPA Act") and the GIPA Regulation apply to the disclosure of information contained in the Return disclosing the interests of councillors and designated persons. The combined effect of the GIPA Act and the GIPA Regulation is that the information in the returns needs to be disclosed **on the website** of each local council, unless to do so would impose unreasonable costs on the council, or if the council determined there was an overriding public interest against disclosing the information.

The original Information Access Guideline 1 issued by the NSW Information and Privacy Commission ("IPC") concluded that there was an overriding public interest against disclosure of the Returns on a council's website. This was consistent with Council's approach.

The revised Information Access Guideline 1 issued by IPC now provides that:

- The returns should be made publicly available on the council's website free of charge **unless there is an overriding public interest against disclosure** or to do so would impose unreasonable additional costs on the council;
- The fact that a return of interests is open access information is a **factor in favour** of disclosure in balancing the public interest;
- In the circumstances where council decides that there is an overriding public interest against disclosure of the return, **consideration** should then be given to whether it is practicable to release an edited copy of the return (for example redacting the individual's signature or residential address) in accordance with section 6(4) of the GIPA Act;

- If it is practicable to do so, then the information should be deleted from a copy of the return and the remainder of the return made available on the council's website;
- Where information is deleted from a return, council should keep a record indicating, in general terms, the nature of the information redacted in accordance with section 6(5) of the GIPA Act.
- Copies of publicly available information about returns may be made in accordance with clause 5(1)(b) of the GIPA Regulation.

The revised Guideline 1 concludes that the disclosure of information contained in the Returns is an important public accountability measure. It advises that open access information should be treated as a special class of information when determining information access. In IPC's view, the threshold to displace State Parliament's legislative intent in that it is open access is set at a high level.

In light of the revised Guideline, Council is required to consider whether or not the returns (in any form) should be made publicly available on the Council's website free of charge.

3. Decision

I am authorised by the principal officer, for the purposes of section 6 of the GIPA Act, to determine whether there is an overriding public interest against disclosure of open access information. I have decided, in accordance with section 6 of the GIPA Act that the Returns should **not** be made available on Council's website. However the Returns will be available for inspection at Council's Rockdale Administration Office.

Specifically my decision in respect of section 6 of the GIPA Act is as follows.

- (1) An agency must make the government information that is its "open access information" publicly available unless there is an overriding public interest against disclosure of the information.

Decision

Balancing the arguments for and against disclosure, I am of the view that there is an overriding public interest against disclosure of Returns of Interest by Council Officials on Council's website.

However a list of Councillors and the positions of designated staff required to lodge returns will be displayed on Council's website with advice that any Return may be viewed free of charge at the Council Rockdale Administration Office. This is consistent with Council's current practice of annual reporting on the compliance obligations of those positions that are required to lodge returns.

- (2) Open access information is to be made publicly available free of charge on a website maintained by the agency (unless to do so would impose unreasonable additional costs on the agency) and can be made publicly available in any other way that the agency considers appropriate.

Decision

As per (1) above

- (3) At least one of the ways in which an agency makes open access information publicly available must be free of charge. Access provided in any other way can be charged for.

Decision

Council will provide access to view any return free of charge at Council's Rockdale Administration Office.

- (4) An agency must facilitate public access to open access information contained in a record by deleting matter from a copy of the record to be made publicly available if inclusion of the matter would otherwise result in there being an overriding public interest against disclosure of the record and it is practicable to delete the matter.

Decision

There is an overriding publicly interest against disclosure on the website and it is not practicable to delete personal information from a return to be placed on the website as the redacted returns would be rendered meaningless for the purposes they are required by the LGA. The disclosure of interest returns available for inspection at Council's Rockdale Administration Centre will not be redacted.

- (5) An agency must keep a record of the open access information (if any) that it does not make publicly available on the basis of an overriding public interest against disclosure. The record is to indicate only the general nature of the information concerned.

Decision

This document is the record of open access information not made publicly available on the website but is available for inspection at Council's Rockdale Administration Centre.

- (6) Nothing in this section or the regulations requires or permits an agency to make open access information available in any way that would constitute an infringement of copyright.

Decision

This subsection is not applicable in this case.

4. The public interest test

Under section 6(1) of the GIPA Act, Council must make the government information that is its open access information publicly available unless there is an overriding public interest against disclosure of the information.

Part 3 of the GIPA Act lists the information that is open access information and Schedule 1 of the GIPA Regulation lists additional open access information for local government. Schedule 1 includes the disclosure of interest returns for council officials.

To decide whether or not there is an overriding public interest against disclosure of the information, I applied the public interest test, which is set out in section 13 of the GIPA Act.

I applied the public interest 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);
- d. without taking into account the fact that disclosure of information might be misinterpreted or misunderstood by any person (as that fact is irrelevant); and
- e. with regard to the fact that disclosure cannot be made subject to any conditions on the use or disclosure of information.

4.1 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 in deciding this matter.

I have considered whether the following considerations in favour disclosure are relevant to this matter:

- 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.*

It is clear to me, and consistent with the Guideline 1, that the Returns promotes some of these public interest considerations in favour of disclosure (namely (a), (b), (c) and (e)). In this regard it furthers openness, transparency and accountability in local government. These are key principles underpinning the Local Government Act 1993 and are also recognised as good governance principles for any public sector organisation.

Also, disclosing the Returns is one measure that protects the integrity of councils' decision-making processes by allowing scrutiny of potential conflicts of interests that would arise where Council officials participate in decision making from which they or their close associates may derive, or be perceived to derive, personal or financial benefit.

To assist members of the public to have confidence that potential conflicts of interest are avoided, they should have sufficient information about the areas of conflict. In this respect, disclosure of the information contained in the returns is an important element in promoting public accountability as well as other verbal and written declarations of interest.

I have considered (d) above and have formed the view that it is not relevant in this case.

4.2 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. The considerations detailed below in my view are relevant to this matter.

4.2.1 Responsible and effective government

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to prejudice the effective exercise by an agency of the agency's functions (Table 1 (f)).

Section 8A of the LGA sets out the guiding principles that apply to the exercise of functions and decision making by councils and include the following:

- Councils should act fairly, ethically and without bias in the interests of the local community;
- Councils should be responsible employers and provide a consultative and supportive working environment for staff;
- Council decision-making should be transparent and decision-makers are to be accountable for decisions and omissions.

The Council's governance framework addresses the guiding principles in the provision of services, facilities and decision making to its community. This also ensures that its workplace requirements in relation to Work, Health and Safety (WHS) matters are met. In brief, having regard to the issues at hand, good

governance practices support streamlined delegations of authority to positions, maximising positions required to lodge returns for greater public scrutiny, and provide a controlled environment in which members of the public may inspect returns so as to promote a safe work environment for those lodging returns.

In applying the provisions of the Model Code this Council embraces a broad interpretation of the return lodgement requirements consistent with its Governance Framework promoting good governance practice and consistency with the LGA guiding principles.

Particularly, Council recognises the importance Council officials in the exercise of its functions and decision making processes and therefore takes seriously the task of identifying positions that should lodge Returns taking into account their duties, responsibilities and delegations and the controlled environment in which these are available for inspection.

Similarly as a responsible and effective local government authority, it streamlines the decision making process for its community. To do so, this Council has delegated to the General Manager all of the authorities capable of being delegated under the Local Government Act and other legislation. In turn, and for the similar reasons, the General Manager has delegated her authority to appropriate positions within the organisation. Along with key positions of advice, an assessment of the administrative, financial and regulatory delegations to positions are considerations in determining whether or not a position should be designated to lodge a return.

Council officials are required to disclose personal information in the returns. In addition to their names and addresses, the returns include details about each of their property and share holdings, debts and business interests, as well as their signatures.

Council receives a minimal number of requests for inspection at its Office of the Returns and these are mainly from the media. The placement of the Returns on the website exposes a significant large number of Council officials who submit returns to uncontrolled broad scrutiny of personal information, fishing expeditions, and personal vendetta via the broad medium of internet search engines such as Google. In addition, the information remains available online far longer than when the information is taken off the website.

The re-release of the IPC Guideline 1 has quickly prompted the key State local government oversight body ie the Office of Local Government (OLG) to review its approach to the interpretation of those required to lodge Returns. The advice provides a much narrower interpretation of the Model Code provisions (and the former Local Government Act provisions on which the Model Code provisions has been framed) than had previously been the case and practice within the local government industry. The advice to the industry includes:

- Councils should be mindful when identifying a position as the position of a designated person or a committee as a committee whose members are designated persons, that the consequence of this is that the council will be required to publish information contained in those persons' returns of interests on their websites.

- The OLG would encourage councils to review the positions and committee memberships that they currently identify as those of designated persons with this consequence in mind.
- Councils should weigh this consequence against the risk that the requirement to publish returns of interests is designed to address to ensure that this is a proportionate mitigation of that risk. This assessment should be based on a consideration of the nature, responsibilities and functions of a role or a committee and the type and level of delegations it exercises.
- OLG would encourage councils to apply the listed principles when identifying positions and committee memberships as those of designated persons.
- Positions or committee memberships involving the performance of low-level administrative or regulatory functions that carry limited or no discretion or financial delegations, should not be identified as positions of designated persons.
- The types of positions or committee memberships that should be identified as designated persons are those that exercise functions or decision-making that involve the potential for significant risk to the council, including of damage to the council's reputation, where conflicts of interest are not disclosed and appropriately managed.

As a responsible and effective local government authority, this Council, similar to many other councils as evidenced through governance networks and the like, has taken a broader view of its responsibilities and had not limited the requirements to lodge returns to "significant risk" matters. Therefore the number of positions "designated" and required to lodge returns has been much greater than would be the case if applying the advice now promulgated by the OLG. The adverse impact is that:

- There would be a significant reduction in the number of returns lodged and available for public scrutiny on the website;
- There would be a significantly reduction of the number of returns lodged and available for public inspection at a Council Office.
- There would be a reduction in the level of delegation of authority afforded to positions to ensure compliance with the advice of the OLG.

In my view, the broader interpretation as to what is meant by "staff, delegates of councils or members of committees who the council identify as exercising functions that could give rise to a conflict of interest" has a greater consistency with the guiding principles of the LGA than narrower interpretation now espoused by the OLG. The broader approach accepted by the industry promotes good governance as more positions of influence, providing advice or exercising delegated authority are required to lodge Returns including planners, certifiers, procurement officers, engineers, and environmental health officers.

It is clear from discussion within Council (supported by discussions generally with the wider local government governance community) and as evidenced by the OLG

advice, that the placement of returns on websites will trigger the review of those required to lodge returns and trigger an increased use of section 739 of the LGA. This will have the effect of reducing even further the information made on the website and more importantly that information available for inspection at Council offices. Council will also undertake a review of delegations to positions.

It is noted that Council officials have a right under section 739 (1) of the LGA to make a request that any material that is available (or is to be made available) for public inspection by or under the Local Government Act be prepared or amended so as to omit or remove any matter that would disclose or discloses the person's place of living if the person considers that the disclosure would place or places the personal safety of the person or of members of the person's family at risk.

Therefore in addition to reducing the number of returns available, there are considerations which enable the redaction of information from returns. This undermines the value of the returns and the information if redacted is not available for inspection in any form. While these avenues are available to Council officials at Bayside, they have been satisfied with the controls in place and not availed themselves to those rights.

In addition section 57 of the Privacy and Personal Information Protection Act ("PPIPA") relates to the disclosure of personal information contained in public registers (like the returns) and requires:

- 1) The public sector agency responsible for keeping a public register must not disclose any personal information kept in the register unless the agency is satisfied that it is to be used for a purpose relating to the purpose of the register or the Act under which the register is kept.
- 2) In order to enable the responsible agency to comply with subsection (1), the agency may require any person who applies to inspect personal information contained in the public register to give particulars, in the form of a statutory declaration, as to the intended use of any information obtained from the inspection.

By virtue of s.32 of the PPIPA must comply with any Privacy Code of Practice that applies to it. The Privacy Code of Practice for Local Government made in 2019 requires that a council should not require any person to provide a reason for inspecting the Register containing the Returns and should not require the making of a statutory declaration as to the intended use of any information obtained from an inspection of the Returns. However the current controlled environment for inspection allows Council officials to be satisfied that they will be informed if an inspection of their return takes place and names of those accessing returns will be noted.

The Model Privacy Management Plan for Local Government issued by the OLG makes it clear that where council is satisfied that the safety or well being of any person would be affected by not suppressing the personal information as requested, Council will suppress the information in accordance with the request unless council is of the opinion that the public interest in maintaining public access to information outweighs any individual interest in suppressing the information. It is also clear that when there is doubt, a council will err in favour of suppression. Any information that is removed cannot be disclosed to other parties (ie members of the public).

The use of the above provisions has the effect of limiting what currently is available for public inspection.

Council's current practice of allowing inspection in a controlled environment has allowed Council to exercise standards of governance within the spirit of the Local Government Act and the Privacy Code of Practice in exercising its functions and decision making responsibilities. This is achieved by:

- Maximising the positions required to lodge Returns for greater public scrutiny at its Office;
- Maximising the information made available for public inspection at its Office as no information in Returns is redacted;
- Maintaining a streamlined decision making process through the use of delegations of authority to positions;
- Providing confidence to those lodging Returns that the inspection regime has controls in terms of determining who accesses those Returns and making staff aware of those requests.

Council currently requires returns to be lodged by at least 134 council officials. All these returns, in an un-redacted form, are available for inspection by the public at Council offices in a controlled environment. The approach now espoused by the OLG would see the returns required to be lodged to reduce to 20. To these s739 application determinations may require Council to remove information. This is a significant reduction in the information that is currently available for public scrutiny. This undermines Council's Governance Framework which underpins its operations to achieve a responsible and effective local government body. There is no doubt in my mind that this approach will have a detrimental effect to that which was intended by the GIPA Act of openness and transparency of local government.

In conclusion, the placement of returns on the website would reasonably be expected to prejudice the effective exercise by Council of its function as set out in section 8A of the LGA and as outlined above.

4.2.2 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:

- reveal an individual's personal information (Table 3(a)),
- expose a person to a risk of harm or of serious harassment or serious intimidation (Table 3 (f)).

I recognise that balancing of public interest considerations necessitates consideration of privacy protection principles and the interaction between the GIPA Act and the PPIP Act. I also recognise that while a return may reveal personal information, which is a public interest consideration against disclosure, this is not a

conclusive presumption against disclosure. It is just one of the relevant factors that need to be weighed against other factors for and against disclosure. In this regard the considerations must be weighed in conducting the public interest test and this balancing should be informed by section 5 and section 20(5) of the PPIP Act which provide that the GIPA Act is not limited by the PPIP Act.

Disclosure of personal information held in electronic records, such as signatures, financial information, and photographs, provides opportunities for identity theft or other criminal acts against the person with very harmful consequences.

Information made available for public viewing (or copying) at Council Office is not 'open to the world at large' in the way that information published on a website is available to the world at large.

In addition, information published in digital form on a website can be accessed by people at any time, and downloaded, copied, modified and republished in various formats. Once published and captured, the information can no longer be controlled, or contained to the original publication context.

While the internet can significantly enable the object of the GIPA Act to open and disseminate government information to the public, the Act itself recognises that there may be a risk (including the potential to expose a person to a risk of harm) to publishing some type of information in the online information environment.

The original and revised IPC Guidelines recognise that a further consideration against disclosure listed in clause 3 of the Table in section 14 is where release of the information may expose a person to a risk of harm or of serious harassment or serious intimidation. It states that it is foreseeable that disclosing the type and combination of information contained in the returns on a council's website could expose a person to harassment and intimidation, and potentially serious harm or identity theft. This consideration weighed stronger in the original guideline rather than the revised one nevertheless it is recognised as a significant factor against disclosure.

In the original Guideline the IPC recognised that disclosing Return information on a website could cut across the right to privacy, and "potentially expose a person to harassment, intimidation, or serious harm or identity theft". At that time, IPC encouraged Councils to note clearly on their website that the returns are available for inspection at council offices during ordinary business hours. It held that releasing information in this manner "facilitates the legitimate public interest in having access to the information, while protecting the individual's right to privacy and safety".

The revised Guidelines have had regard to recent NSW Civil and Administrative Tribunal ("NCAT") cases where NCAT's view was that the intimidation or harassment needs to be heavy, weighty or grave and not trifling or transient. Also that the risk needs to be considered objectively and any evidence of the risk should be as it currently stands, rather than evidence of past actions.

Further Clause 3 in the Table in section 14 of the GIPA Act lists as a consideration against disclosure the fact that information may reveal someone's personal information, or would contravene an information privacy principle under the Privacy

and Personal Information Protection Act 1998 (NSW) (PIIP Act). An individual has a right to protect the privacy of their personal information. Given the amount of personal information that may be contained in the returns, it is recognised that special care should be taken to protect this right.

The publishing of this information on a website provides no additional probity or transparency to any local government process but significantly impinges on individual privacy rights. The website provides the availability of the Returns, and potential exposure of the personal information contained within them, to an unrestricted audience

The website exposes a large number of Council officials who submit returns to much broad scrutiny, fishing expeditions, and personal vendetta via the broad medium of Google search. This is balanced against the minimal number of genuine requests received by Council to view the returns. The unnecessary risk exposure to Council officials by placing the returns on the website does not equate to the current public demand to view the returns at Council offices.

In addition, the access to personal identifying information, particularly home addresses is concerning for staff with families and who may be fearful of ramifications if a member of the public is disgruntled with a particular staff member. The reality is the cause of that ill will may not necessarily be related to their employment with Council – which makes the accessibility of information via the Council website all the more concerning, the ramifications of which could be far more complex and far reaching than the intent behind the GIPA legislation.

As mentioned, in terms of openness and transparency, Council has taken a broad interpretation of the positions required to lodge returns and has resisted the use of s739 of the LGA to redact personal information on returns. Those lodging returns have been satisfied with the controlled environment for inspection in place at Council.

Like the IPC, I have had regard to the recent decisions of NCAT and the Court of Appeal in terms of open access information. These focus on the development assessment process. The Returns are significantly different in type and content to other additional open access information listed in Schedule 1 documents particularly development application documents. The Returns by their very nature contain a significant amount of personal information relative to the other open access documents. The type of open access information is a factor that I have taken into account and is a factor against disclosure.

I have taken into account that disclosure be avoided where serious harassment, intimidation or safety risks could be identified. The placement of the Returns on the website in such an uncontrolled environment elevates this as a serious issue. It is considered unreasonable to require Council officials to sacrifice their legitimate right to privacy and protection given that the purpose of the returns as a public accountability measure can be equally fulfilled by the current practice of making them available for inspection in a controlled environment at Council offices.

In conclusion, there is a public interest consideration against disclosure of information as it could reasonably be expected to reveal an individual's personal

information and expose a Council official to a risk of harm or of serious harassment or serious intimidation.

4.3 Balancing the public interest test

I have considered the relevant public interest considerations in favour of and against disclosure of the Returns requested.

Having weighed up the considerations, I have decided that there is an overriding public interest against disclosure of the Returns on the website.

Consideration has been given to placing on the website redacted forms however these could reveal the identity of an individual as well as information about their personal and business affairs in a forum in an uncontrolled environment and one that is far from secure. In addition a redacted return that is made available on the website would be significantly different to the return lodged and publicly available for inspection free of charge in a controlled environment at Council office. The placement of a significantly redacted return on the website defeats the purpose of this important public accountability measure.

5. Access

5.1 Form of access

The Returns will continue to be made available for inspection at the Rockdale Administration Office.

6. Review rights

This is not a reviewable decision under the GIPA Act.

7. Further information

If you have any questions about this notice or would like any further information, please contact the Manager Governance & Risk on +61295621544 or email Council at council@bayside.nsw.gov.au



Fausto Sut
Manager Governance & Risk