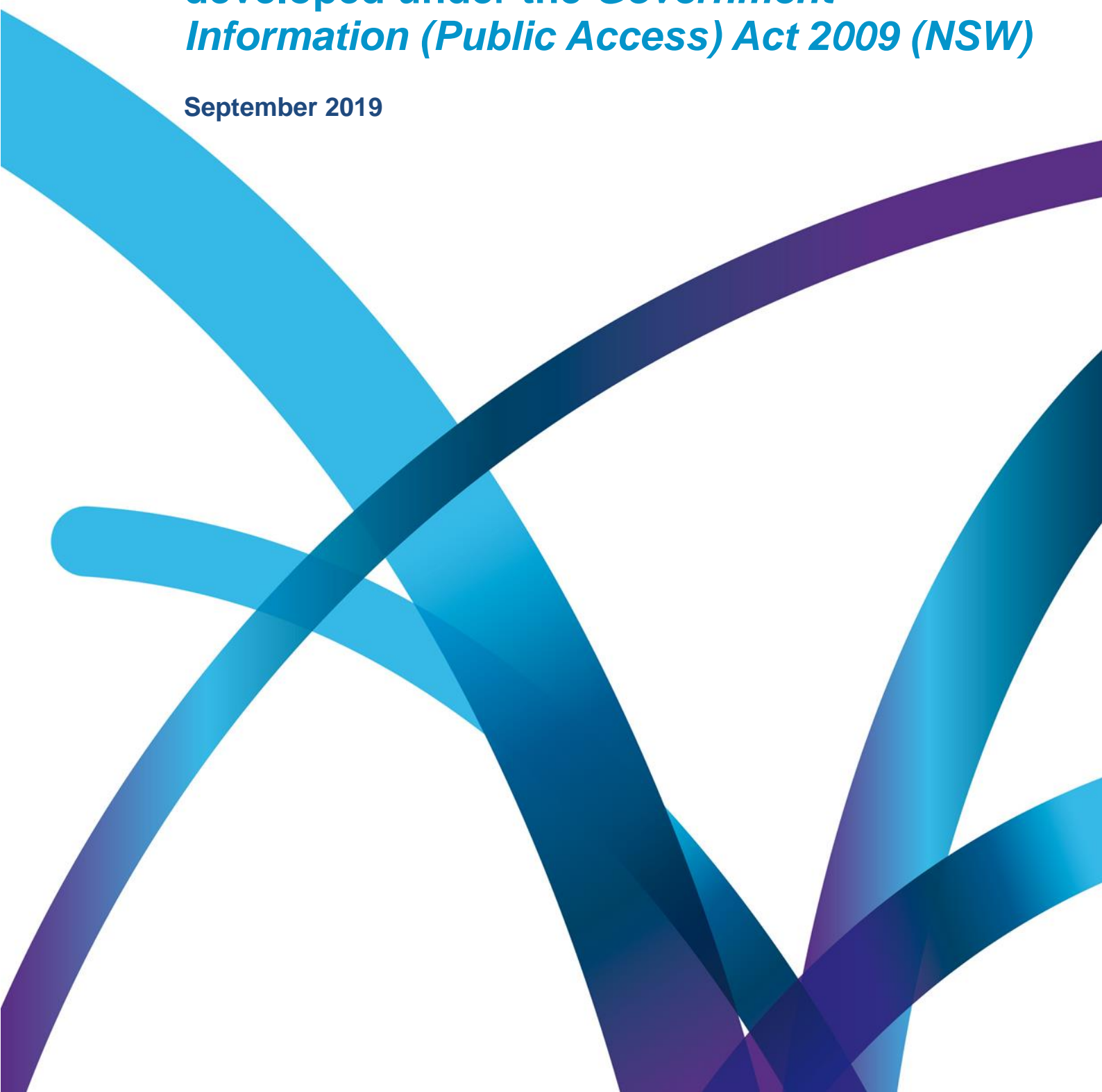




information
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new south wales

Guideline 1: For local councils on the disclosure of information contained in the returns disclosing the interests of councillors and designated persons developed under the *Government Information (Public Access) Act 2009 (NSW)*

September 2019



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Guideline 1: For local councils on the disclosure of information contained in the returns disclosing the interests of councillors and designated persons developed under the *Government Information (Public Access) Act 2009 (NSW)*

The Information Commissioner is empowered under sections 12(3) and 14(3) of the *Government Information (Public Access) Act 2009 (NSW)* (“GIPA Act”) to issue guidelines to assist agencies regarding the public interest considerations in favour of, or against, disclosure.

These Guidelines, made pursuant to those sections of the GIPA Act, are made to assist local councils to determine the public interest considerations for and against disclosure of information contained in the returns disclosing the interests of councillors and designated persons as required by clause 1(2)(a) of Schedule 1 of the *Government Information (Public Access) Regulation 2018 (NSW)* (‘the GIPA Regulation’).

These Guidelines supplement the provisions of the GIPA Act. Agencies must have regard to them in accordance with section 15(b) of the GIPA Act.

The Guidelines have been developed in consultation with the Office of Local Government, and the Privacy Commissioner.

The operation and effectiveness of the Guidelines will be reviewed after two years or as required by any intervening developments relevant to the Guideline.

Elizabeth Tydd

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Overview

Part 4 of the [Model Code of conduct for Local Councils in NSW \(2018\)](#) (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. That return may 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.

Mandatory proactive release, also known as open access information, is one of the four information access pathways under the GIPA Act. Proactive release advances the object of the GIPA Act to “maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective ...” The GIPA Act contributes to the building of an integrity culture through the establishment of a framework based around the principles of pro-active disclosure and a presumption in favour of public interest disclosure.

The mandatory proactive release provisions of the GIPA Act and the GIPA Regulation apply to the disclosure of information contained in returns 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.

In order to decide whether there is an overriding public interest against disclosure, councils need to apply the public interest test, and weigh the public interest considerations in favour of and public interest considerations against disclosure.

This Guideline recognises that disclosing the information in the returns furthers openness, transparency and accountability in local government. It also facilitates the identification and management of potential conflicts of interest that might arise where councillors and other staff participate in decisions from which they may derive, or be perceived to derive, personal or financial benefit.

However, the returns may contain personal information about the person concerned, and, potentially, about third parties such as family members. This is information which individuals may have concerns about disclosing publicly on a website and may object to publication following consultation under the GIPA Act.

[Section 6\(4\)](#) of the GIPA Act requires agencies to “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”.

The fact that information is open access information is an important factor in favour of disclosure which must be balanced against any applicable considerations against disclosure, as was noted by the NSW Civil and Administrative Tribunal Appeal Panel in two recent cases¹. In *Webb v Port Stephens Council (No. 3)* [2018] NSWCATAP 286, the Appeal Panel stated at paragraph 77:

Where the information in issue is in fact open access information, as noted by the Appeal Panel in McEwan, this is an “important factor in favour of disclosure” (in addition to other relevant factors in favour of disclosure, including the general public interest in favour of disclosure provided for in s12(1) of the GIPA Act) when it comes to determining whether the balance lies between a public interest consideration against disclosure and the public interest in favour of disclosure.

Open access information should be available free of charge on a website maintained by the relevant agency. Open access information can also be made publically available in other ways, however at least one of the ways in which the information is accessible must be free of charge.²

Consequently, this Guideline provides that the requirement in Clause 1(2)(a) of [Schedule 1](#) of the GIPA Regulation, that returns of councillors and designated persons be released as part of local councils' open access information, should be interpreted as follows:

- 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.

Releasing the information contained in the returns of councillors and designated persons in this manner facilitates the legitimate public interest in having access to the information, while protecting the individual's right to privacy and safety.

¹ *McEwan v Port Stephens Council* [2018] NSWCATAP 211, *Webb v Port Stephens Council (No. 3)* [2018] NSWCATAP 286

² GIPA Act sections 6(2);6(3)

Part 1: Returns disclosing the interests of councillors and designated persons

What is a return?

- 1.1 Part 4 of the [Model Code](#) establishes the requirements for the disclosure of pecuniary interests by councillors and designated persons. This includes disclosures of interests in written returns (returns of interests) and disclosures of pecuniary interests at meetings. This Guideline deals only with requirements in relation to written returns of interests and does not affect the obligations of councillors or committee members to disclose pecuniary interests at meetings.
- 1.2 The Model Code is made under section 440 of the *Local Government Act 1993* (NSW) (LGA) and Part 8 the *Local Government Regulation 2005*. Part 4 of the Model Code replicates and replaces the requirements previously set out in sections 441- 449 of the LGA.
- 1.3 Clause 4.21 of the Model Code requires that councillors and designated persons prepare and submit written returns of interest within three months after:
 - becoming a councillor or designated person, and
 - 30 June of each year, and
 - becoming aware of an interest they are required to disclose.
- 1.4 A 'designated person' is defined in clause 4.8 of the Model Code as:
 - *the general manager*
 - *other senior staff of the council*
 - *a person (other than a member of the senior staff of the council) who is a member of staff of the council or a delegate of the council and who holds a position identified by the council as the position of a designated person because it involves the exercise of functions under the LGA or any other Act (such as regulatory functions or contractual functions) that, in their exercise, could give rise to a conflict between the person's duty as a member of staff or delegate and the person's private interest*
 - *a person who is a member of a committee of the council identified by the council as a committee whose members are designated persons because the functions of the committee involve the exercise of the council's functions (such as regulatory functions or contractual functions) that, in their exercise, could give rise to a conflict between the member's duty as a member of the committee and the member's private interest.*
- 1.5 Clause 4.1 of the Model Code defines a 'pecuniary interest' as one involving a "reasonable likelihood or expectation of appreciable financial gain or loss to the person". Clause 4.2 provides that a person "will not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision you might make in relation to the matter, or if the interest is of a kind specified in clause 4.6" (which are interests that do not have to be disclosed).

- 1.6 For the purposes of the Model Code, a pecuniary interest is one held by the councillor and designated person, or his or her spouse, de facto partner, relative, partner or employer, or a company or other body of which the person, or a nominee, partner or employer of the person, is a shareholder or member.³ However, a person is not taken to have a pecuniary interest in a matter:
- a) *if the person is unaware of the relevant pecuniary interest of the spouse, de facto partner, relative, partner, employer or company or other body; or*
 - b) *just because the person is a member of, or is employed by, a council or a statutory body or is employed by the Crown; or*
 - c) *just because the person is a member of, or a delegate of a council to, a company or other body that has a pecuniary interest in the matter, so long as the person has no beneficial interest in any shares of the company or body.*⁴
- 1.7 The returns are designed to promote openness and transparency in local government, and to avoid a conflict of interest on the part of councillors and senior council staff who exercise decision-making functions.

What information do the returns contain?

- 1.7 Part 2 of Schedule 1 of the Model Code sets out the matters that must be disclosed in the returns of interests in the following categories:
- interests in real property: clauses 5 - 8
 - gifts: clauses 9-11
 - contributions to travel: clauses 12-14
 - interests and positions in corporations: clauses 15-18
 - interests as a property developer or a close associate of a property developer: clauses 19-20
 - positions in trade union and professional or business associations: clauses 21-22
 - dispositions of real property: clauses 23-25
 - sources of income: clauses 26-30
 - debts: clauses 31 - 33
 - discretionary disclosures: clause 34_(A person may voluntarily disclose in a return any interest, benefit, advantage or liability, whether pecuniary or not, that is not required to be disclosed under another provision of the Schedule).
- 1.8 The form of the return is provided in Schedule 2 of the [Model Code](#).

³ Clause 4.4 of the Model Code

⁴ Clause 4.5 of the Model Code

Disclosure under the LGA now replaced with the GIPA Act and Regulations

- 1.9 The LGA previously required that the current version of the return of interests of councillors and designated persons was to be made available for public inspection free of charge.
- 1.8 In 2009, the GIPA Act replaced section 12 of the LGA with the mandatory proactive release provisions in [sections 6](#) and [18](#) of the GIPA Act, and the GIPA Regulation (see [Part 2](#)).

Part 2: Disclosure requirements under the GIPA Act and the public interest test

Mandatory disclosure requirements

- 2.1 [Section 6](#) of the GIPA Act requires agencies to make certain information publicly available. This information is known as open access information. [Section 18](#) contains a list of the open access information that all agencies must make publicly available. Schedule 1 to the GIPA Regulation lists additional open access information relevant only to local councils. This includes the returns of the interests of councillors and designated persons (see [clause 1\(2\)\(a\)](#) of Schedule 1).
- 2.2 The GIPA Act requires under section 6 that open access material must be made publicly available unless there is an overriding public interest against disclosure. Section 6(2) provides that the 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.
- 2.3 Section 6(4) requires agencies to facilitate public access to open access information by deleting matter (content) if it is practicable to do so. This facilitates the release of open access information by enabling any matter subject to an overriding public interest against disclosure to be deleted so that the remainder of the information can be released. In circumstances where council determines that there is an overriding public interest against disclosure of open access information, section 6(4) may operate to require public release of the remaining open access information which is not subject to the overriding public interest against disclosure. Where information is deleted in accordance with section 6(4), the agency is required to keep a record indicating, in general terms, the nature of the information that has been redacted (see section 6(5)).
- 2.4 [Part 2](#) of the GIPA Regulation also provides that local councils must provide a copy of a record containing the information (or providing the facilities for making a copy of a record containing the information) to any person either free of charge or for a charge not exceeding the reasonable cost of photocopying.
- 2.5 The combined effect of these provisions is that information in the returns of the interests of councillors and designated persons needs to be made available on a council's website, unless there is an overriding public interest against such disclosure, or if placing it on the web would impose unreasonable costs on a council.

The public interest test

- 2.6 The GIPA Act provides that there is a presumption in favour of disclosure of government information unless there is an overriding public interest against disclosure (section 5). In order to determine if there is an overriding public interest against disclosing information in the returns of the interests of councillors and designated persons, councils need to apply the public interest test under [Part 2](#) of the GIPA Act.
- 2.7 The fact that a return of interests is open access information is an important factor in favour of disclosure which must be balanced against any applicable considerations against disclosure. In balancing the public interest decision makers should have regard to the intent of the legislature and apply the Act consistent with the objects of section 3(2) of the GIPA Act.
- 2.8 The public interest test is described in [section 13](#) of the GIPA Act as “[t]here 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”.
- 2.9 In applying the public interest test factors such as privacy may be considered. While the note to [section 12](#) provides a non-exhaustive list of examples of factors that may be considered in favour of disclosing information, only those considerations listed in the Table in [section 14](#) may be taken into account in deciding that information should not be disclosed. The considerations against disclosure must be such that they outweigh those in favour, overturning the general presumption in the GIPA Act in favour of disclosure (see [section 5](#)).
- 2.10 The Information Commissioner has published the following resources to assist agencies to apply the public interest test:
- [Guideline 4: Personal information as a public interest consideration under the GIPA Act](#)
 - [What is the public interest test?](#)

Part 3: How the information on returns should be disclosed

Public interest considerations in favour of disclosure

- 3.1 The note in [section 12](#) of the GIPA Act contains a number of factors that favour disclosure of information, including the following:
- 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.*
 - 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.*
 - Disclosure of the information could reasonably be expected to ensure effective oversight of the expenditure of public funds.*
 - The information is personal information of the person to whom it is to be disclosed.*
 - 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.*

- 3.2 Disclosure of the returns of the interests of councillors and designated persons promotes some of these public interest considerations in favour of disclosure (see (a), (b), (c) and (e)). It furthers openness, transparency and accountability in local government. Disclosing the returns also protects the integrity of councils' decision-making processes by allowing scrutiny of potential conflicts of interests that would arise where councillors or staff participate in decision making from which they or their close associates may derive, or be perceived to derive, personal or financial benefit.
- 3.3 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.

Public interest considerations against disclosure

- 3.4 Councillors and designated persons may be 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 family business interests, as well as their signatures.
- 3.5 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) (PPIP 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, special care should be taken to protect this right.
- 3.6 The balancing of public interest considerations may necessitate consideration of privacy protection principles and the interaction between the GIPA Act and the PPIP Act is well established within both statutes. 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.
- 3.7 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 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.
- 3.8 In *Pallier v NSW State Emergency Service* [2016] NSWCATAD 293, the NSW Civil and Administrative Tribunal indicated that the intimidation or harassment needs to be heavy, weighty or grave and not trifling or transient.⁵ The risk needs to be considered objectively. Any evidence of the risk should be as it currently stands, rather than evidence of past actions.⁶

⁵ *Pallier v NSW State Emergency Service* [2016] NSWCATAD 293, paragraph 81

⁶ *Ibid*, paragraph 85.

Application of section 6(4) of the GIPA Act

- 3.9 In circumstances where council determines that there is an overriding public interest against disclosure of a return of interest, council may still be required to release an edited copy of the return.
- 3.10 [Section 6\(4\)](#) of the GIPA Act requires agencies ‘must facilitate public access to open access information contained in a record by deleting matter from a copy of the record if disclosure of the matter would otherwise be prevented due to an overriding public interest against disclosure, and it is practicable to delete the matter’.
- 3.11 The type of matter which might be deleted from a return in these circumstances will vary depending on the public interest considerations applied. However, examples might include the signatures or residential address of the individual making the return.
- 3.12 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

Conclusion

- 3.13 Disclosure of information contained in the returns of the interests of councillors and designated persons is an important public accountability measure. Open access information should be treated as a special class of information when determining information access. Accordingly, the threshold to displace Parliament’s intent that it is open access is set at a high level.
- 3.14 The requirement in clause 1(2)(a) of [Schedule 1](#) of the GIPA Regulation that returns of councillors and designated persons be released as part of local councils’ open access information should be interpreted as follows:
- The returns should be made publicly available on the council’s website unless there is an overriding public interest against release or to do so would impose unreasonable additional costs on 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, consideration should then be given to whether it is practicable to release an edited copy of the record (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 record 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.
 - Copies of publicly available information about returns may be made in accordance with [clause 5\(1\)\(b\)](#) of the GIPA Regulation.
- 3.15 Releasing the information contained in the returns of councillors and designated persons in this manner facilitates the legitimate public interest in having access to the information, while respecting other considerations against disclosure including privacy.

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